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CALIFORNIA

STREET LAWS

A DISCUSSION OF THE GENERAL LAWS OF CALIFORNIA RELATING TO THE OPENING AND IMPROVING OF STREETS WITHIN INCORPORATED CITIES AND TOWNS, OF CHARTER PROVISIONS, AND OF THE PRINCIPLES RELATING TO STREET WORK BY PRIVATE CONTRACT,

WITH

FORMS

AND AN

APPENDIX CONTAINING THE TEXT OF THE STATUTES

BY

ERNEST STODDARD PAGE

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1911

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PREFACE.

The aim of this book is to present in convenient form the law of California relating to street work. As its name indicates, it is a local book. It is not intended to be a general treatise on the law of special assessments. I have, however, stated such of the general principles as are applicable to our California statutes, and have endeavored to make the work complete so far as California law is concerned. The constitutional amendment of 1896, making charters control in municipal affairs, has made it necessary to include a discussion of charter provisions. The chapter on private contracts requires a brief discussion of the law of mechanics' liens. For completeness, I have referred to the general taxation statutes applicable to street work, and have given the statutes in full in the Appendix; but I have not discussed these acts in detail.

I have adopted the text-book method of treatment, believing it will prove the most convenient for the profession. Exactness being essential in a work of this kind, I have used the language of the courts when possible. In general, I have stated the reasons for the various rules, so that the principles involved may be applied to other facts. While I have not hesitated to repeat when clearness and convenience seemed to require it, in most instances I have used a system of cross-references to avoid repetition. Thus, by use of these references, the discussion of each act becomes complete.

The forms under the Vrooman Act, the Bond Act, the Change of Grade Act of 1909, and the Street Opening Act of 1889, have been taken, for the most part, from admittedly valid proceedings of the city of Oakland. For many of these I am indebted to Mr. F. R. Thompson, City Clerk of the City of Oakland. The forms under the Local Improvement Act of 1901 and the Street Improvement Act of 1909 are my own. Forms are useful as guides; but there are so many variations in street proceedings, and the laws are changed so frequently, that it is never wise to

use a form without a careful consideration as to whether it fits the particular need.

In the Appendix I have collected all of the general street acts now in force, and all provisions of city charters and of special incorporating acts relating to street work.

E. S. PAGE.

OAKLAND, CAL., June, 1911.

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CALIFORNIA
STREET LAWS.

PART I.
INTRODUCTORY.

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§ 1. **Introductory.**—The California Street Laws[1] are a series of statutes regulating the opening and the improving of streets within the incorporated cities and towns of the state. For the most part, they provide for the assessment of the cost of the work upon property in the vicinity of the improvement, upon the theory that such property is specially benefited. In many respects they are similar to statutes in other states; but there are also many differences. Many of the decisions depend upon the wording of particular provisions, and hence can be applied to other statutes only after a careful comparison of terms. There are certain general and fundamental principles, however, which apply to most of the statutes, and which we shall discuss in this first chapter.

§ 2. **Definition of Assessment.**—"An assessment, as distinguished from a tax, is a special and local charge or im-

[1] In Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348, 34 Pac. 819, the court said: "'Street work' is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street—work in repairing or making a street." It was held in this case that the lighting of streets is not street work. By an act of 1905, the legislature provided for the payment of the cost of lighting streets by a special assessment upon lands benefited. While this may not be technically street work, the act is governed by the same general principles as the street work acts, and is treated in a later chapter.

position upon property in the immediate vicinity of municipal improvements, predicated upon the theory or principle of equivalents or benefits from such improvements, and levied as a charge upon land or property specially benefited thereby. It is a charge upon property, in theory at least, upon the principle of apportionment according to the relation between burden and benefit."[2] It is variously known in the books as a "local assessment," a "special assessment," and a "street assessment." In reality it is a tax, and derives its authority from the taxing power of the government;[3] but for purposes of convenience it has been given a distinct name.

[2] Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; Taylor v. Palmer, 31 Cal. 251; People v. Austin, 47 Cal. 353.

The distinction is clearly stated in Emery v. San Francisco Gas Co., 28 Cal. 345, at 356: "The term 'taxation,' both in common parlance and in the laws of the several states, has been ordinarily used, not to express the idea of the sovereign power which is exercised, but the exercise of that power for a particular purpose, viz., to raise a revenue for the general and ordinary expenses of the government, whether it be the state, county, town or city government. But there is another class of expenses, also of a public nature, necessary to be provided for, peculiar to the local governments of counties, cities, towns and even smaller subdivisions, such as opening, grading, improving in various ways, and repairing highways and streets, and constructing sewers in cities, and canals and ditches for the purpose of drainage in the country. They are generally of peculiar local benefit. These burdens have always, in every state, from its first settlement, been charged upon the localities benefited, and have been apportioned upon various principles; but whatever principle of apportionment has been adopted they have been known, both in the legislation and ordinary speech of the country, by the name of assessments. Assessments have also, very generally, if not always, been apportioned upon principles different from those adopted in taxation, in the ordinary sense of that term; and anyone can see, upon a moment's reflection, that the apportionment, to bear equally, and do substantial justice to all parties, must be made upon a different principle from that adopted in taxation, so called."

[3] Emery v. San Francisco Gas Co., 28 Cal. 345; Taylor v. Palmer, 31 Cal. 251; People v. Austin, 47 Cal. 353; Chambers v. Satterlee, 40 Cal. 497; Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; City of

§ 3. **Main Distinction Between Assessment and Tax is Method of Apportionment.**—It will be seen from the foregoing that the fundamental distinction between an assessment and a tax is in the method of apportionment of burdens. As a general proposition, the legislature may make such apportionment as it sees fit, subject only to express constitutional limitations. "The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation."[4] In California the constitution does not limit the power to apportion assessments, and consequently any apportionment which does not violate some fundamental principle is valid. Ordinarily, the exercise of the power, in detail, is a matter of municipal rather than state concern.[5]

§ 4. **Distinction Between Operation of Taxing Power and Power of Eminent Domain.**—The distinction between the power of taxation and the power of eminent domain must be carefully noted. It is well stated in a case already referred to.[6] "Some confusion of ideas may formerly have

San Diego v. Linda Vista Irr. District, 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33. It has sometimes been said that an assessment is a municipal tax: Hancock v. Whittemore, 50 Cal. 522; Whiting v. Quackenbush, 54 Cal. 306.

[4] People v. Mayor of Brooklyn, 4 N. Y. 420, 55 Am. Dec. 266; Emery v. San Francisco Gas Co., 28 Cal. 345. See, also, cases cited to subsequent sections. And see Burnett v. Mayor etc. of Sacramento, 12 Cal. 76, 73 Am. Dec. 518. The case first cited is the leading case in this country.

[5] The early case of Taylor v. Palmer, 31 Cal. 240, lays down this principle clearly. It must be borne in mind, however, that a former constitution is referred to. Inasmuch as the present constitution contains no such provision, the power is not limited to any particular method of its exercise. In the former constitution the power was merely recognized as inherent or necessary to the complete working of a municipal government.

[6] Emery v. San Francisco Gas Co., 28 Cal. 345, 352. The distinction is made clear in People v. Mayor of Brooklyn, 4 N. Y. 420, 55

arisen from a supposition that an apportionment according to benefits involved the principle of specific compensation for property taken, and still more from not separating and keeping distinctly in view the operation of the two powers in that class of cases involving both; as, where land has been taken for a new street, and at the same time an assessment made upon the owners of the property in the district embracing the street, including the owner of the land taken, to pay for the land thus appropriated. There are such cases, and in these instances both powers may be called into action. Compensation must be made for the land appropriated under the power to take property for a public use, and a sum must also be levied under the right of taxation to make compensation. The owner of the land in such cases would be liable to pay his share of such tax, and thus the amount ultimately received would only be the balance after deducting the amount of the assessment from the amount of compensation. But, if these distinctions are kept in view, it will be found in all cases of assessments for improvements, whether the sum to be raised is apportioned according to benefits, according to value, upon the front foot, square foot, ... acre, or where each party is required to pay for the improvement in front of his own land, the assessment must be referred to the taxing power, and these different modes are only dif-

Am. Dec. 266. "Taxation exacts money or services from individuals as, and for, their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals." See Chambers v. Satterlee, 40 Cal. 497.

ferent modes of making the apportionment and not the exercise of different sovereign powers."

§ 5. **Right to Compensation for Property Damaged.**—It is a familiar principle that private property cannot be taken for public use without compensation; and the fact that private property is taken for street purposes is not an exception to the rule. The street opening acts make adequate provision for this; so we shall postpone detailed discussion of this phase of the subject to a later chapter. The California constitution, however, goes even further than this, and provides that "private property shall not be taken *or damaged* for public use without just compensation having been first made to, or paid into court for the owner."[7] This has been construed as giving to the property owner a right of recovery for such indirect or consequential damage to his property as he might sustain over and above that sustained by him in common with other abutters or the public in general.[8] The extent of this rule is well stated and explained by Mr. Justice Harrison in Eachus v. Los Angeles Consolidated Electric Railway:[9]

"The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal

[7] Const., art. 1, sec. 14.

[8] Reardon v. City and County of San Francisco, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; Eachus v. Los Angeles Con. Electric Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829.

[9] 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750. In Brown v. Board of Supervisors, 124 Cal. 275, 57 Pac. 82, it was held that where there is no obstruction of light and air, and no impairment of the right of access, there is no right to compensation. See, also, Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712.

For a general discussion of the elements of damage, see 30 Am. St. Rep. 835, note.

pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use. . . . . The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. . . . . Whether the grading of the street in front of a lot will increase or diminish the value of the lot will depend upon the relative condition of the street and lot before and after the grading, and must be determined from the circumstances of each case. The elements which enter into this consideration are varied, and no rule can be prescribed which will be applicable to all cases. It is not every change of grade that will constitute a damage to the adjacent property. An excavation of one or two feet might not appreciably impair the value of the lot, while one of twenty feet would naturally have that effect; and the increased facility for communication with other parts of the city, or the opening up of the land to access by the public, may fully equal, if not exceed, the cost of grading the lot to correspond with the changed grade of the street. The mere fact that the property is worth as much after the grading as before is not an absolute test, since this may be the result of a general advance in values throughout the entire vicinity, irrespective of the grading, or dependent upon some municipal improvement, of which the grading in front of the lot is only a part. Nor is its diminution in value for some particular use necessarily a damage to the property. The grading of a street may impair the desirability or salability of a lot for use as a residence, while at the same time it may render it so desirable as a site for a warehouse or a manufactory as to increase its market value. The market value

of a lot is not determined by its value for any particular use, but results from a consideration of all the uses for which it is adapted, and to which it may be applied; and it is only when the market value of property is diminished by the public use that the property can be said to have sustained such damage as will entitle its owner to receive compensation. The same rule is applicable when a street is for the first time reduced to an established grade, as when a change in the grade has been made after the street has once been brought to such grade."

The later California statutes recognize this principle and have prescribed a procedure which we shall discuss later. The fact that compensation is not provided for may authorize an injunction against the prosecution of the work,[10] but it is not a defense to an action to enforce an assessment when no claim has been made previously.[11] The remedy is not against the contractor unless he departs from the official grade.[12]

§ 6. Constitutionality—Due Process of Law—Right to Hearing.—It has frequently been objected that statutes providing for special assessments violate the provision of the Fourteenth Amendment to the constitution of the United States in that they take property without due process of law. This matter has been considered by the United States Supreme Court in a series of cases, and the general conclusion has been reached that if the owner has a right to a hearing at some stage of the proceedings, at which he may be heard as to the assessment on his particular piece of property, the provision above referred to is not violated. Owing to the importance of the subject, we shall examine some of these decisions in detail. In Davidson v. Board of Admin-

10 Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570.

11 Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

12 Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829. See, also, Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879.

istrators of the City of New Orleans,[13] Mr. Justice Miller said: "Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode for confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And in the same case, Mr. Justice Bradley said: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

§ 7. **Same—Hagar v. Reclamation District.**—In Hagar v. Reclamation District,[14] a case arising in California and involving a California assessment, Mr. Justice Field said: Appellant's "contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to

[13] 96 U. S. 97, 24 L. ed. 616.
[14] 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569.

him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. . . . . Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things or persons or occupations. In such case the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. . . . . But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections

to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law." And it was further held that where the only method of enforcement is by action, that in itself constitutes a sufficient hearing.

§ 8. **Same—Spencer v. Merchant.**—The last case was followed by Spencer v. Merchant,[15] in which the constitutional requirement was stated more definitely. "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are

[15] 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. ed. 763.

benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

§ 9. **Same—Fallbrook Irr. District v. Bradley.**—In another case arising from California[16] the court again stated the limitations clearly. "It has been held in this court that the legislature has power to fix such a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken."

[16] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369. See, also, Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. Rep. 625, 35 L. ed. 419; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. Rep. 192, 32 L. ed. 544; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. ed. 270.

§ 10. Same—Excess of Assessment Over Benefit—Norwood v. Baker.—The question as to whether the fact that a statute makes it possible for an assessment to exceed the benefit, or to be made irrespective of benefit, makes it invalid, has caused a great deal of discussion. The case of Norwood v. Baker [17] was considered for some time as laying down the rule that there must not be an excess of assessment over benefit.

After stating the general authority of the legislature to determine a district, Mr. Justice Harlan said: "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property

[17] 172 U. S. 269, 43 L. ed. 443.

owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

§ 11. Same—Limitations on Norwood v. Baker—Front-foot Rule Constitutional.—The case of Norwood v. Baker has been strictly limited in later cases, and is now all but expressly overruled. In French v. Barber Asphalt Paving Co.[18] it was pointed out that in the former case an ordinance was involved in which the local authorities had endeavored to assess the entire cost of opening a street, including the cost of the condemnation proceedings, upon property abutting on the new street and owned by the party whose property was taken. After stating that this appeared to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power, Mr. Justice Shiras said: "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker." And while Norwood v. Baker is not expressly referred to in Louisville & N. R. Co. v. Barber Asphalt Pav. Co.,[19] Mr. Justice Holmes uses language consistent only with the strictest

[18] 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879.
[19] 197 U. S. 430, 25 Sup. Ct. Rep. 466, 49 L. ed. 819.

limitation of the rule there laid down. He says: "There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district—the municipality—and to disguise, rather than to answer, the theoretic doubt. . . . . It is now established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases." And it is now held that the assessment may be levied upon the property in the district, either according to valuation, superficial area, or frontage.[20]

[20] Cass Farm Co. v. City of Detroit, 181 U. S. 396, 21 Sup. Ct. Rep. 644, 45 L. ed. 914; Webster v. Fargo, 181 U. S. 394, 21 Sup.

§ 12. **Same—Notice of Hearing.**—Of course, where a hearing is necessary, notice thereof must be given to the owner. Otherwise, the right to a hearing might be of little avail. The notice, however, need not be personal. Notice by publication may be sufficient to authorize a board to determine the necessary facts upon which an assessment may be based.[21]

§ 13. **Same—Summary.**—It is believed that the cases cited in the preceding sections establish the following general principles:

1. It is competent for the legislature to fix the district and the amount to be paid. In such case the owner has no right to a preliminary hearing as to benefits.

2. The legislature may direct that the cost of the work be assessed upon the land abutting upon the improvement in proportion to frontage or area. In such case the owner has no right to a preliminary hearing as to benefits.

3. The legislature may direct that the cost be assessed upon the land benefited, and may leave the determination of the district and the benefits to a subordinate body. In such a case the owner is entitled to a hearing as to benefits.

4. The fact that the assessment is in excess of benefits is immaterial, except when it is so unreasonable that it is a clear case of depriving an owner of his property under the guise of a proper proceeding.

Ct. Rep. 623, 45 L. ed. 912; City of Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. Rep. 44, 49 L. ed. 232; City of Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. Rep. 624, 45 L. ed. 917; Chadwick v. Kelly, 187 U. S. 540, 23 Sup. Ct. Rep. 175, 47 L. ed. 293; Schaefer v. Werling, 188 U. S. 516, 23 Sup. Ct. Rep. 449, 47 L. ed. 570; Town of Tonawanda v. Lyon, 181 U. S. 389, 21 Sup. Ct. Rep. 609, 45 L. ed. 908.

21 Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. Rep. 750, 37 L. ed. 637; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369; French v. Barber Asphalt Pav. Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879; Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. Rep. 616, 45 L. ed. 900.

5. The owner has a right, at some time during the proceedings, to be heard as to the assessment on his particular land. This right of the owner is not impaired, however, if a suit is necessary to enforce the lien, in which he is entitled to make his defense.

6. Where a hearing is necessary, notice thereof should be given to the owner; but this may be by publication.

§ 14. **Same—California Cases.**—The California courts have uniformly upheld the validity of special assessment acts. Some of the earlier cases discuss the general principles very fully.[22] No hearing need be given as to the expediency of the improvement,[23] although some provision should be

[22] Emery v. San Francisco Gas Co., 28 Cal. 345 (a leading case, containing a full discussion); Emery v. Bradford, 29 Cal. 75; Taylor v. Palmer, 31 Cal. 240; Chambers v. Satterlee, 40 Cal. 497; Appeal of Piper, 32 Cal. 530; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379.

[23] In Lent v. Tillson, 72 Cal. 404, 14 Pac. 71, Temple, J., said: "It is claimed that the parties to be affected had a right to be heard upon the question whether the street should be widened or not. That the proceeding is judicial in its character, is, in fact, a part of the proceeding to take private property for public use, to which the persons whose property is affected must be parties. There was no provision for such hearing. But it is plain that it is not a judicial act in that sense. It may be said to be judicial in the sense that it is not ministerial. It is an act which rests within the sound discretion of the authority. It may act or not, or may act in such mode as it may deem best within legal limits, but it is not a determination by a judicial tribunal of the rights of the parties before it. It is a legislative act, and the power to determine the expediency of a public improvement rests with the legislature, or such local authorities as have been charged with the duty of determining the policy of the government in such matters. Some authorities from New Jersey are cited to the contrary, but the overwhelming current of decision is in accord with this view. Where compensation is provided for property taken, and persons interested are awarded an opportunity to be heard as to the amount, the constitutional requirement is satisfied. So, too, where a district is charged with an assessment for a local improvement, it is enough if the parties to bear the burden have a right to be heard as to the assessment before the lien becomes final upon their property."

made for testing the validity of the assessment as to any particular property. It is enough if the parties to bear the burden have a right to be heard as to the assessment before the lien becomes final on their property.[24] Notice of a hearing should be provided for; but it need not be personal. Notice by publication is sufficient.[25] The case of Norwood v. Baker has been limited to its exact facts. The front-foot rule is upheld as a proper means of apportioning the burden upon the property benefited.[1] Applying these principles Mr. Justice Harrison said, in Hadley v. Dague:[2]

"The provision in the street improvement act of this state, that in cases where, in the opinion of the city council, the work of the improvement is not 'of more than local or ordinary public benefit,' the cost of any street improvement shall be assessed as an entirety upon the lots and lands fronting upon the improvements, and shall be apportioned between the several lots therein according to their frontage, is a

[24] Lent v. Tillson, 72 Cal. 404, 14 Pac. 71.

[25] Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[1] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377; San Francisco Paving Co. v. Bates, 134 Cal. 39, 66 Pac. 2; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309. See, also, Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127; Boyle v. Tibbey, 82 Cal. 11, 22 Pac. 1128; German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Emery v. San Francisco Gas Co., 28 Cal. 345.

In Lent v. Tillson, 72 Cal. 404, 14 Pac. 71, a case decided before Norwood v. Baker, Temple, J., said: "The main practical difference between assessment for a local improvement and general taxation seems to be, that in general taxation it is difficult, and generally impossible, for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the taxpayers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes. Within these limits the legislature is the sole judge of when and to what extent the power shall be used."

[2] 130 Cal. 207, 62 Pac. 500. See, also, Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

declaration by the legislature that, in the judgment of that body, the property within that district will receive a benefit from the improvement in proportion to its frontage upon the work. Unless, therefore, it is made to appear upon the face of the proceedings, or by some competent showing, that there is a gross or substantial variation from this principle, it is the duty of the courts, under the rules and authorities above cited, to uphold the assessment. Before the judiciary would be justified in holding an assessment to be invalid, it should be made to appear that it is, as was said in Norwood v. Baker, 'in substantial excess of the benefits,' or, as was said in Cleveland v. Tripp, that it 'palpably transgresses' the principle upon which it is authorized."

§ 15. **Whether Legislature may Exercise Power Directly.** Under the old constitution it was held that the legislature could not exercise the power of assessment directly. In an early case the Supreme Court said: "The power of taxation is a power which the legislature takes from the law of its creation, for it is an indispensable power, without which it would become impossible for that body to perform its functions; or, in other words, the power does not come from the constitution. That instrument, so far as it deals with the subject, as is well understood, is not a grant, but a limitation. Take away the constitutional limitations, which are that the burden must be apportioned upon the ad valorem principle, and made to operate equally and uniformly, and the legislature would be enabled to enforce the power of taxation by the mode designated by the word 'assessment'; but with the ad valorem limitation it cannot, for thereby a different mode is prescribed, and the legislature limited to that mode. . . . . The constitution does not provide what powers the legislature shall confer on municipal corporations, but assumes that certain powers, among which are 'taxation' and 'assessment,' are indispensable to corporate existence, and that without them a municipal corporation would be unable to sustain

itself or perform its functions. It does not undertake to define those powers, but assumes that everybody knows what they are, and that the legislature must necessarily grant them by the very act of creating the corporation. It results that the legislature not only may grant, but must grant, to one of its creatures a power which it is not permitted to exercise in its own capacity, or to observe greater exactness, the privilege of exercising the power of taxation for certain purposes in a mode in which the legislature is forbidden to exercise it."[3]

§ 16. **Void Assessment cannot be Validated.**—Upon the theory that the legislature cannot exercise the power of assessment directly, it was held in several early cases that the legislature cannot ratify a void assessment.[4] Likewise, it was held that the legislature cannot impose the burden of an assessment upon property not liable at the time proceedings were commenced.[5] Nor can the legislature authorize payment of the consideration named in a void contract out of municipal funds.[6]

§ 17. **Purpose must be Public—Private Streets.**—The taxing power can be exercised only for a public purpose. Private property cannot be made liable for the cost of improving other private property for private benefit. Hence, if the

[3] Taylor v. Palmer, 31 Cal. 240. See, also, People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Brady v. King, 53 Cal. 44; Schumacker v. Toberman, 56 Cal. 508. But see Creighton v. Manson, 27 Cal. 613.

[4] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Brady v. King, 53 Cal. 44; People v. McCune, 57 Cal. 153; Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427; Schumacker v. Toberman, 56 Cal. 508. But see City and County of San Francisco v. Certain Real Estate, 42 Cal. 513.

[5] Kelly v. Luning, 76 Cal. 309, 18 Pac. 335.

[6] Conlin v. City and County of San Francisco, 99 Cal. 17, 37 Am. St. Rep. 17, 33 Pac. 753, 21 L. R. A. 474. In an early case, however, it was held that the legislature may appropriate municipal funds to pay a contractor's claim when the assessment cannot be enforced: Creighton v. City and County of San Francisco, 42 Cal. 447.

court sees that an assessment is for a private purpose, it will refuse to sustain it. For this reason, an assessment for the improvement of a private street will not ordinarily be sustained.[7] And a subsequent dedication and acceptance will not remedy the jurisdictional defect.[8] It is conceivable that under some circumstances the improvement of private property may be a public affair; but such cases are rare, and have not been recognized in California.[9] It has been held that a subsequent assessment for work done under an abortive contract is void because the purpose is not public.[10]

§ 18. **No Personal Liability for Assessment.**—It was held in an early case, decided under the old constitution, that the owner of land abutting upon the street cannot be made personally liable for an assessment. It was said: "To say that the owner of land bordering upon an improved street can be made personally liable for the payment of the improvement is equivalent to saying that his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether within the corporate limits or without, whether benefited or not, shall be held responsible for the tax, which, in turn, is equivalent to saying that his entire estate may be taxed for the improvement in direct contradiction of the very terms of the power. To uphold such a

[7] Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Cook v. Sudden, 94 Cal. 443, 29 Pac. 949. These cases do not fully sustain the statement in the text. They merely hold that certain statutes do not authorize assessments for work on private streets. As to the general principle, see In the Matter of Market Street, 49 Cal. 546; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. ed. 763.

[8] Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249.

[9] For a dictum to the effect that the legislature cannot authorize the improvement of a private street, see Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

[10] In the Matter of Market Street, 49 Cal. 546. But see San Francisco v. Certain Real Estate, 43 Cal. 513; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. ed. 763. This matter is discussed more fully in a later chapter.

doctrine would be to overthrow the distinction which is shown to exist between the power of taxation and the power of assessment, as contradistinguished from each other. Under it the power of 'assessment' becomes the power of 'taxation' in contradistinction, and of course subjected to all the restrictions placed by the constitution upon the exercise of the latter, which is equivalent to saying that the power of 'assessment' as contradistinguished from that of 'taxation,' has no existence under the constitution. To avoid any misconception of our meaning, we add that the power of taxation, when exercised either by the legislature immediately or mediately through the intervention of a municipal corporation, must be exercised under and within the limitations of the constitution—that is to say, it must be exercised upon the ad valorem principle, and so as to secure equality and uniformity, except when exercised through a municipal corporation for the purpose of improving its streets. When so exercised, it is withdrawn or excepted from the constitutional limitations so far, and no further, as to permit its exercise for the purpose and in the mode indicated and measured by the word 'assessment,' as defined and understood in the legislative and judicial history of the country at the time the constitution was adopted. At that time a personal liability, to be satisfied by the seizure of other property than that assessed, property not bordering upon nor in the vicinity of the improved street, and therefore not benefited by the improvement, constituted, so far as we are advised, no part of the mode. The mode then in vogue was made by definition a part of the constitution, and became and remains the measure of the power of 'assessment' which may be restricted by the legislature with a view to prevent abuse, but cannot be enlarged without overturning the limitations of the constitution." [11]

[11] Taylor v. Palmer, 31 Cal. 240. See, also, Beaudry v. Valdez, 32 Cal. 269; Guerin v. Reese, 33 Cal. 292; Gaffney v. Gough, 36 Cal. 104; Coniff v. Hastings, 36 Cal. 292; Himmelmann v. Steiner, 38 Cal.

§ 19. Right to Assess for Incidental Expenses.—The legislature may authorize the entire expense of the improvement to be assessed upon the district benefited. The cost may include not only the actual contract price, but incidental expenses, such as the cost of publication of notices, the cost of superintendence, and the like.[12] These matters are all part of the cost of the work. The various statutes make provision for such incidental expenses, and generally provide what may be allowed.

§ 20. Constitutional and Statutory Provisions as to Taxes not Applicable to Assessments.—It is quite generally held that constitutional and statutory provisions referring in terms to taxes or to taxation do not apply to street assessments. This is upon the theory that "when the statesmen who frame, and the people who adopt them, employ terms in relation to any particular subject, which have, in that relation, in the legislative, judicial and general language of the country, acquired an established, well known and more limited signification than the word in other relations might indicate, it must be presumed that they intend to use those terms in such established, more limited sense, unless it clearly appears to the contrary by the context."[13] Thus, constitutional provisions requiring that taxation shall be equal and uniform throughout the state have been held not to apply to street assessments;[14] and the same has been held

175; Randolph v. Bayue, 44 Cal. 366; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351; Manning v. Den, 90 Cal. 610, 27 Pac. 435; Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. But see Emery v. Bradford, 29 Cal. 75. Upon the subject of the power to make an assessment a personal liability, see monographic note in 133 Am. St. Rep. 929 to City of Brookings v. Natwick, 22 S. D. 322, 117 N. W. 376, 17 Ann. Cas. 1254, 18 L. R. A., N. S., 1259.

[12] See People ex rel. Doyle v. Austin, 47 Cal. 353.

[13] Emery v. San Francisco Gas Co., 28 Cal. 345, 360.

[14] Emery v. San Francisco Gas Co., 28 Cal. 345; People v. Naglee, 1 Cal. 252, 52 Am. Dec. 312; Burnett v. Mayor etc. of Sacramento, 12 Cal. 83, 73 Am. Dec. 518.

in regard to a provision that all property shall be taxed in proportion to its value.[15]

The fact that a statute refers to a "tax" or to an "assessment" is not always conclusive as to its character. Where from the context it appears that the wrong word has been used, the courts will go behind the wording and interpret according to the intent. Thus, in an early statute, provision was made in one section for the assessment and collection of a "tax" upon lands to be benefited, while another section directed that the cost of the improvement be "assessed" in proportion to benefits. The court held that the character must be decided by the nature of the imposition, and not by the mere name by which it is called, and reached the conclusion that it was an assessment.[16]

§ 21. **Same—Exemptions from Taxation.**—Upon the same principle, it is held that ordinary exemptions from taxation do not exempt property from the lien of street assessments. The constitution of the state, being but a restriction upon the power of the legislature, the limitations therein contained will not be extended beyond the legitimate meaning and use of the terms employed.[17] Thus, it is generally held that an exemption of church property does not relieve it from the burden of street assessments;[18] and the same has been held in other states as to exemptions of cemetery property, canal property, and the like.[19] Property which is directly bene-

15 Emery v. San Francisco Gas Co., 28 Cal. 345; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291.

16 Doyle v. Austin, 47 Cal. 353.

17 City Street Imp. Co. v. Regents of the University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451. See, also, City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291; Witter v. Mission School District, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905.

18 Emery v. San Francisco Gas Co., 28 Cal. 345, and cases cited. This case contains an excellent discussion of the general principles applicable to the entire subject.

19 Emery v. San Francisco Gas Co., 28 Cal. 345.

fited by an improvement will not be exempted unless there is a clear legislative intention expressed. In theory, at least, the improvement is a direct pecuniary benefit to the property; and the courts refuse to adopt any construction which will require one property owner to pay for the benefit conferred upon another.

§ 22. **Same—Exemptions of Public Property.**—The same rule applies, to a limited extent, to public property. It is a general principle that public policy will deny and forbid the application of general laws to property held in trust for public purposes, such as public school buildings, city and county municipal buildings, and the necessary land upon which they stand, "because of the grave interference with necessary public functions, governmental or educational, which would thus result."[20] Thus, land upon which a public school building is situated cannot be subjected to a street assessment, because the inevitable result would be to affect the capacity of the school district to perform its functions.[21] "But the rule goes no further, and wherever lands, though owned by some public agent or mandatary of the government, school boards, counties or cities, penal or reform institutions, or institutions for the feeble-minded or insane, are not in use in the performance of a public function, such lands, in the absence of a constitutional or legislative restriction (such as we have seen does not exist in this state), are justly compelled to bear their part of the expense which goes directly

[20] City Street Imp. Co. v. Regents of the University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451. This case contains an excellent discussion of the subject, and cites a number of authorities from other states to the same effect. In general, as to the liability of property of a municipal corporation for taxes, see 29 Am. St. Rep. 389, note. As to its liability for street assessments, see 33 Am. St. Rep. 400, note.

[21] Witter v. Mission School District, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905. See, also, cases cited in the other notes to this section.

to increase their values."[22] Accordingly, it has been held that pueblo lands held by a city and not used for any municipal purpose may be subjected to the lien of a street assessment.[23] Likewise, land held by the regents of the University of California, not for school purposes, but to be held as an investment, or from which to derive rentals, may be assessed for a local improvement.[24] There would seem to be no doubt, however, that the legislature may, by express words, exempt all public property from liability for any assessment whatever.[25]

§ 23. **Proceedings are In Invitum.**—Proceedings upon which a street assessment is based are purely statutory, and are in invitum, or without the consent of the owners to be charged. It follows that such proceedings can only be conducted in the cases and after the manner provided by the statutes. The authority conferred by these statutes must be strictly pursued. Unless their provisions are substantially complied with, the assessment will be void.[1] This principle, however, should not be carried to an extreme. "Notwithstanding that the proceedings for street work and

22 City Street Imp. Co. v. Regents of the University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451, per Henshaw, J.

23 City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291.

24 City Street Imp. Co. v. Regents of the University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451.

25 "The power of assessment is but a portion of the power of taxation, and if the sovereign cannot tax its own property for general revenue purposes, it cannot be doubted that it may exempt it from assessment or taxation in any form": People ex rel. Doyle v. Austin, 47 Cal. 353.

1 San Diego Inv. Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082; Kelso v. Cole, 121 Cal. 123, 53 Pac. 353; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; City of Stockton v. Whitmore, 50 Cal. 554; Blanchard v. Beideman, 18 Cal. 261; Hewes v. Reis, 40 Cal. 255.

This principle is stated in a great number of cases and is so familiar that I have not attempted to collect them all here. The cases will be found cited under different applications of the principle in a later part of the work.

sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor by a resort to the extreme technicalities of the law can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery."[2]

§ 24. **Street Work Contracts not Affected by Change of Law.**—Contracts for street work, so far as the rights of the contractors are concerned, are governed by the law in force at the time the contracts are made. The provisions of the law enter into and become a part of the contract. "A valid contract cannot be abrogated by the adoption of a new constitution, any more than it can be by the enactment of a law by the legislature."[3]

§ 25. **Extent of the Lien.**—It is generally held that a lien of a street assessment is prior to all other liens except those

[2] Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53; McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924. See, also, Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94.

[3] Ede v. Knight, 93 Cal. 160, 28 Pac. 860. See, also, Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767; Oakland Pav. Co. v. Barstow, 79 Cal. 45, 21 Pac. 544; Houston v. McKenna, 22 Cal. 550.

for general taxation.[4] It extends, in case of front-foot assessments, to the entire lot fronting upon the improvement at the time jurisdiction to order the improvement attaches.[5]

Unless the statute expressly authorizes it, the lien does not attach to a railroad right of way.[6]

§ 26. Remedies of the Owner—In General.—The remedies of those seeking to enforce street assessments are provided by the several statutes, and will be discussed with them. The remedies of the owner, however, do not altogether depend upon express statutory provisions. For minor matters, not jurisdictional, an appeal to the legislative body of the city or town is generally provided, and its decision is made final and conclusive. At the present, we shall discuss merely those general remedies, not conferred by the street acts, but which the owner is entitled to invoke under the general principles of law and equity, when the proceedings are so defective as to be void.

§ 27. Same—Injunction Against Taking Property.—A court of equity will freely grant an injunction to restrain a municipality from wrongfully taking real property from an individual under guise of a legal proceeding. Thus, an owner may enjoin the taking of his property for street purposes when no compensation has been tendered.[7] And he may likewise enjoin work which will damage his property

[4] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Chase v. Trout, 146 Cal. 350, 80 Pac. 81. For a discussion of the subject, see post.

[5] Dougherty v. Miller, 36 Cal. 83. For a fuller discussion, see post.

[6] See Southern Cal. Ry. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583; Fox v. Workman, 155 Cal. 201, 100 Pac. 246.

[7] Demartini v. City and County of San Francisco, 107 Cal. 402, 40 Pac. 496. As to the right to an injunction to restrain the improper vacation of a street, see 46 Am. St. Rep. 494, note; 101 Am. St. Rep. 117, note.

for public use, until such proceedings have been taken as will compensate him therefor.[8] But if he fails to do this, he is not entitled to resist payment of an assessment on his land merely because compensation has not been provided for.[9] We shall discuss the taking and damaging of property more fully in later chapters.

§ 28. **Same—Injunction to Prevent Enforcement of Assessment.**—The rules governing the issuance of an injunction to restrain the enforcement of a special assessment are practically the same as those relating to general taxation. The general principle, laid down in the leading case of Dows v. City of Chicago,[10] has been adopted by the Supreme Court of California.[11] "Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of Government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." And this rule applies to street assessments.[12] The ground of equity jurisdiction under which it is ordinarily

[8] Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834.

[9] Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

[10] 11 Wall. 108, 20 L. ed. 65. The whole subject of injunctions against taxation and against special assessments is exhaustively treated in 1 Pomeroy's Equitable Remedies, c. 19. For an application of the principle that a court of equity will not interfere with a trivial matter, see Mietzsch v. Berkhout (Cal.), 35 Pac. 321.

[11] Savings & Loan Soc. v. Austin, 46 Cal. 415. In general, see 2 Am. St. Rep. 95, note.

[12] Dean v. Davis, 51 Cal. 406.

attempted to bring street assessment cases is the prevention of a cloud on title. If the proceedings are void on their face, it is held that there is no cloud, and therefore no right to an injunction.[13] If the proceedings are void, but the invalidity is not apparent upon their face, there is a cloud and a right to an injunction.[14] Thus, if in a suit to enforce a lien or in an action of ejectment brought by a purchaser at a delinquent sale the owner would be obliged to offer evidence to defeat a recovery, there is such a cloud as will warrant equitable relief.[15] The California courts have not defined what they mean by the statement that relief may be granted to prevent a multiplicity of suits. A mere averment in the complaint that the granting of the injunction will prevent a multiplicity of suits is not sufficient to justify the issuance of the writ.[16] In passing upon an applica-

[13] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Bucknall v. Story, 36 Cal. 67.

[14] Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; True v. Fox, 155 Cal. 534, 102 Pac. 263; Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881.

[15] Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612.

[16] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433. For a full discussion of the subject, and particularly with relation to assessments, see 1 Pomeroy's Equity Jurisprudence, secs. 258–260. In Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612, the court refused to decide whether several owners may join in an action to enjoin an illegal assessment. The court said: "Assuming for the purposes of this decision that there was a misjoinder, it is apparent that no substantial right of the defendant was affected thereby. Defendant's claim as to each and all of the lots was based entirely upon the validity of the legal proceedings, common to all the lots, leading up to the assessment. Those proceedings were, as we have seen, ineffectual for any purpose and void. No prejudice could possibly result to defendant from having that question determined in a single proceeding maintained by the different owners. . . . . It seems to be thoroughly settled that a judgment after trial upon the merits will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where it is plain that such misjoinder did not affect any substantial right of a party."

tion for a preliminary injunction, the court should consider whether a greater injury will result to the defendant from the granting of the injunction than to the plaintiff from withholding it.[17] Where the city is neither liable for damages nor entitled to the money for its own use, it is not a necessary party defendant in an action to enjoin the assessment.[18]

§ 29. **Same—Necessity for Tender.**—It is a general principle of equity that he who seeks equity must do equity. In applying this principle, it is held that a party seeking equitable relief from a tax must, as a condition to relief, pay or tender such portion thereof as is equitably due. Hence, it is held that where a street assessment is not void, a party seeking relief must pay or tender so much of the amount as is equitably due.[19] Thus, where merely a sale is attacked, relief will be awarded only upon condition of the payment or tender of the amount of the assessment. These principles do not apply, however, when the assessment is void. In such a case, no tender nor payment is necessary.[20]

17 Santa Cruz Fair Bldg. Assn. v. Grant, 104 Cal. 306, 37 Pac. 1034.

18 Cohn v. Parcels, 72 Cal. 367, 14 Pac. 26.

19 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301. See, also, Hennessy v. Hall, 11 Cal. App. Dec. 645. Compare Weber v. San Francisco, 1 Cal. 455; Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765; Hellman v. Shoulters, 114 Cal. 141, 44 Pac. 915, 45 Pac. 1057.

No tender is necessary to quiet title where lien has expired by lapse of time: Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

20 Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414.

In Woollacott v. Meekin, cited above, Angellotti, J., said: "It is urged that the complaint is fatally defective in that there is no allegation that plaintiffs ever offered to pay what the street improvements were reasonably worth to their lots. It is said that they cannot have the equitable relief sought without doing equity. The equitable maxim thus invoked has no application under the facts shown by the complaint. We have here proceedings for street work, had, presumably, without the consent of the land owner, which were void ab initio. They could not serve as a sufficient foundation for any assessment, and for this reason the entire assessment was void. It

§ 30. **Same—Statutory Suit to Quiet Title.**—The strict rule which has limited actions to prevent or remove a cloud on title to cases where the proceedings or instruments involved are valid on their face does not apply to the statutory suit to quiet title. The Code of Civil Procedure provides that such "an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim."[21] Accordingly, it has been held that such an action may be maintained by an owner against the holder of a certificate of sale issued by the superintendent of streets, although the proceedings are void on their face.[22] "A judgment in such an action that the defendants have no right, title or interest in or lien upon the land in question is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect."[23] An injunction against the execution of a deed thereafter is proper, if necessary to make the relief effectual.[24] Where a deed is held invalid, but the lien of the assessment remains, title will be quieted only upon condition that plaintiff pay into court the amount due.[25]

cannot be held upon the facts shown that there was any moral obligation on the part of the owner to pay any part of such invalid assessment. The mere fact that the street work called for by the invalid proceedings and contract had been done does not create such a moral obligation." As to the necessity of tender in cases of general taxation, see Couts v. Cornell, 147 Cal. 560, 109 Am. St. Rep. 168, 82 Pac. 194.

21 Sec. 738.

22 Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55. See, also, Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414; Joyce v. Newmark, 7 Cal. App. 176, 93 Pac. 1041; Charters v. Stansbury, 10 Cal. App. 192. As to the general proposition that the action is not limited to cases where instruments are valid on their face, see Castro v. Barry, 79 Cal. 443, 21 Pac. 946.

23 Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

24 Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

25 Hennessy v. Hall, 11 Cal. App. Dec. 645, 113 Pac. 350. Compare Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

§ 31. Same—Recovery of Money Paid Under Protest.—The right of a property owner to pay street assessments under protest and subsequently recover back the amount paid in an action at law is very strictly limited. Upon the principle which we have already discussed that statutes referring in terms to general taxation do not ordinarily apply to street assessments, it is held, in general, that the provisions of the Political Code allowing such relief in the case of general taxation do not apply.[1] It is only when a void assessment is paid involuntarily under duress that a court of law will grant any redress. "If one pays an illegal demand with full knowledge of its illegality, his protest does not take from the payment its voluntary character, unless the payment is necessary in order to protect his person or property. The payment of a tax to prevent a threatened sale of real estate is not compulsory, unless the conveyance by the officer will have the effect to deprive the owner of some defense to the tax, or throw upon him the burden of showing its illegality. If the officer's want of authority will appear upon the face of the deed, or if the illegality of the proceedings will necessarily appear in an attempt by the purchaser to disturb the owner in the possession of the land, a payment to prevent such sale is not made under duress."[2] Where, however, the proceedings, although void in fact, are valid upon their face, and an injunction or payment is necessary to prevent a sale and a resulting cloud upon the title,

1 Phelan v. City and County of San Francisco, 120 Cal. 4, 52 Pac. 38; Davis v. City and County of San Francisco, 115 Cal. 67, 46 Pac. 863. See, also, Pacific Mut. Life Ins. Co. v. County of San Diego, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571; Elberg v. San Luis Obispo Co., 112 Cal. 316, 41 Pac. 475, 44 Pac. 572.

The statute referred to is Pol. Code, sec. 3819. Of course, the provision may apply where it is expressly adopted.

2 Phelan v. City and County of San Francisco, 120 Cal. 4, 52 Pac. 38; Davis v. City and County of San Francisco, 115 Cal. 67, 46 Pac. 863; Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220; De Baker v. Carillo, 52 Cal. 473.

it has been held that a payment is made under duress; and that if protest is made, the owner may subsequently recover the amount in an action at law.[3] It will be noted that the payment must be made to prevent a sale of the property. It would seem clear that this principle cannot be applied to cases where it is necessary to resort to a court of law to enforce the lien.

§ 32. **Same—Certiorari.**—The writ of certiorari is not ordinarily a proper remedy to annul street assessment proceedings. The scope of the writ is limited in California to cases where "an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."[4] The writ has been said not to be applicable to street assessments for two reasons. In the first place, where the statute provides that the assessment may be collected only by means of foreclosure in a court of record, the facts relied upon in certiorari would be available as a defense.

[3] Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

It was contended by the defendant in this case that the city was not liable because the fund was for the use of and to be dispersed by another organization, to wit, a street opening district. The court, however, held that the act of 1889 does not create a distinct organization separate from a city in the sense urged by the city. It was also contended that plaintiff had no cause of action because the evidence failed to show that he presented his claim to the council, or that it was acted upon by the council. In answer to this, the court pointed out that there is no provision of the charter of Oakland which requires such a claim to be first presented, and held that the provision that every demand must, before it can be paid, be presented to the auditor to be approved, etc., does not apply to this sort of claim. It was further contended that the complaint failed to state a cause of action because it did not appear that the superintendent had authority to make a deed; but the court held that he did have such authority.

To the effect that the complaint must allege that a sale was advertised or threatened, see Decker v. Perry (Cal.), 35 Pac. 1017.

[4] Cal. Code Civ. Proc., sec. 1068.

Hence, the court would be justified in holding this defense a plain, speedy and adequate remedy. In the second place, the action of the board in determining upon street improvements is legislative rather than judicial. Inasmuch as the writ of certiorari is not proper for the review of legislative proceedings, it is not proper for the review of street improvement proceedings.[5]

§ 33. **Same—Writ of Prohibition.**—The writ of prohibition is defined as a writ which arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.[6] It is essentially jurisdictional, and therefore judicial; and does not extend to ministerial matters. The Supreme Court has held that the attempt of the legislature to extend the writ to ministerial matters is void.[7] Most matters pertaining to street assessments are legislative or ministerial, and hence fall beyond the jurisdiction of the writ of prohibition. Accordingly, it has been held that the writ will not issue to pre-

[5] Quinchard v. Board of Trustees of Alameda, 113 Cal. 664, 45 Pac. 856. This case contains an excellent discussion of the subject.

In Stoner v. City of Los Angeles, 8 Cal. App. 607, 97 Pac. 692, a certiorari proceeding to review a street opening was sustained. The remedy was not discussed, however. But see Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; Symons v. City and County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

[6] Code Civ. Proc., sec. 1102. Commenting upon the code definition, Garoutte, J., said, in City of Coronado v. City of San Diego, 97 Cal. 440, 32 Pac. 518: "Prohibition is essentially jurisdictional, and therefore judicial; mandamus is purely ministerial; and when the Code of Civil Procedure declares that the writ of prohibition is the counterpart of the writ of mandate, the declaration cannot be true in its broadest sense, and to that extent is misleading. These two writs are the counterpart of each other, to the extent that one is prohibitory and the other mandatory; one acts upon the person, the other upon the tribunal; but beyond that they have nothing in common."

[7] Camron v. Kenfield, 57 Cal. 550; Farmers' Union v. Thresher, 62 Cal. 407.

vent a sale of property for nonpayment of a street assessment.[8]

§ 34. **Publications.**—All publications required to be made by general street laws must be published in a newspaper of general circulation as that term is defined in the Political Code unless the statute provides otherwise.[9] "A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

8 Le Conte v. Town of Berkeley, 57 Cal. 269.

9 Pol. Code, secs. 4458, 4460. As originally passed, section 4458 was unconstitutional in part because of a defect in the title: Estate of Melone, 141 Cal. 331, 74 Pac. 991. But this was cured by legislative amendment in 1905.

This probably does not apply to the Vrooman Act. See sec. 34, subd. 4.

CHAPTER II.

GENERAL VIEW OF THE STREET ACTS.

§ 35. In general.
§ 36. Classification of the acts.
§ 37. General acts since the adoption of the constitution of 1879.
§ 38. Distinguishing features of the general acts—The Vrooman Act.
§ 39. Same—Bond Act.
§ 40. Same—Improvement Act of 1911.
§ 41. Same—Local Improvement Act of 1901.
§ 42. Same—Change of Grade Act of 1909.
§ 43. Same—Street Improvement Act of 1909.
§ 44. Same—Tree Planting Act.
§ 45. Same—Street Lighting Act.
§ 46. Same—Street Opening Act of 1889.
§ 47. Same—Street Opening Act of 1903.

§ 35. **In General.**—Street work, under the laws of California, may be done either by private or public contract. When done by private contract, the work, although subject to the supervision of public officials, is largely governed by the ordinary rules relating to contracts and to mechanics' liens. The liability of the owner is entirely contractual. When done by public contract, the work is governed either by one of a series of acts of the legislature or by a city charter. It is the main purpose of this book to consider these statutes. Prior to the adoption of the new constitution, in 1879, street work was done almost entirely under provisions contained in special acts of the legislature incorporating the various cities and towns of the state. Some of these old acts are still in force and will be found in the Appendix. The constitution of 1879, however, as originally adopted, provided that municipal corporations should be governed by and be subject to general laws. The effect of this provision was to suspend the operation of the special statutes as soon as a general law was passed. In 1896, that provision of the constitution was amended by inserting the

words "except in municipal affairs," so that the requirement now is that municipal corporations shall be governed by and be subject to general laws, except in municipal affairs. Street work is a municipal affair.[1] The effect of this amendment will be considered in detail in a later chapter.[2] In general, however, its effect was to validate all charter provisions passed before general laws went into effect, and to authorize the adoption of charter schemes for street work thereafter. At the present time, therefore, street work in some cities is done under general laws and in others under charter provisions. For this reason, I have discussed the charter systems in a later portion of the work.

§ 36. **Classification of the Acts.**—The street work acts may be divided roughly into two classes: those providing for the opening or fixing the boundaries of streets, and those providing for the improvement of streets already opened. The former include the exercise of the power of eminent domain as well as that of assessment. The latter for the most part are simple assessment statutes; although, on account of our constitutional provision requiring compensation for property damaged for public use, some of the street improvement acts also involve the exercise of the power of eminent domain. Again, the acts may be divided into two classes, based upon the method of enforcing the assessment. In the first class are the acts where the assessment must be enforced by a suit by the contractor or his assignee. Acts coming within this class are the Vrooman Act, the Improvement Act of 1911, and the Tree Planting Act, although under some parts of the Vrooman Act and the Improvement Act of 1911 the assessments are collected otherwise. The Bond Act makes provision for collection in this manner upon notice from the owner that he does not desire a bond issued. In the second class are the acts where the assessment is col-

1 See post, sec. 806.
2 See post, sec. 806.

lected by the city and paid to the contractor. Again, the acts may be divided into two classes, based upon the manner of assessing benefits. In the first class are the acts where the method of apportionment is definitely fixed according to frontage. These acts are the Vrooman Act, the Bond Act, the Improvement Act of 1911, and the Tree Planting Act, although the first three also authorize an assessment according to benefits as determined by the superintendent of streets. In the second class the amount of the assessment is determined by the decision of some officer or officers as to the amount of benefit the particular property derives from the improvement. These divisions must be borne in mind in applying cases interpreting one act to facts arising out of another.

§ 37. **General Acts Since the Adoption of the Constitution of 1879.**—The first general street work act passed after the adoption of the new constitution was the so-called Vrooman Act of 1883.[3] At the time of the passage of this act, the constitution provided: "No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."[4] In order to come within these limitations, this first act provided for an assessment upon a district according to benefits; and further provided that no contract should be awarded until the city treasurer should give notice that the necessary amount was in the treasury.

[3] Stats. 1883, p. 32.
[4] Const., art. 11, sec. 19.

The constitutional limitation was removed in 1884 by the amendment of the constitution;[5] and in 1885 the second Vrooman Act, in a form something like its present, was adopted. Since that time few legislatures have failed to amend it. Alternate procedures have been adopted, and the principle of special assessment has been extended to matters of various sorts. The first general street opening act was passed in 1889, and in the main is still in force. An alternate procedure is provided, however, by the act of 1903. The several acts are discussed in detail in later chapters. I shall here briefly characterize each, so that the reader may have a general view of the whole system.

§ 38. Distinguishing Features of the General Acts—The Vrooman Act.—The oldest and most frequently used of the street improvement acts is the Vrooman Act of 1885. Its exact title is, "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885. Its scope is stated in section 2, which confers general jurisdiction to order streets improved and repaired, and to provide a drainage system. The assessment is not levied until after the work is done. It is apportioned either by the front-foot method or according to benefits as determined by the street superintendent and by the council on appeal. The assessment is enforced by the contractor by a suit in the Superior Court to foreclose the lien. The advantage of this to the property owner is clear, for he is not obliged to pay until he receives the benefit. It is not of corresponding disadvantage to the contractor, for under no circumstances is he entitled to his pay until the work is completed. The main advantage of the act to all parties is that it has been frequently before the courts, and its meaning has, in many instances, been defi-

[5] As to the validity of the amendment, see Oakland Pav. Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801. See, also, Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615. Compare Oakland Pav. Co. v. Hilton, 69 Cal. 479, 11 Pac. 3.

nitely determined. Part II of the act provides for the issuance of municipal bonds to pay the cost of sewer work. These are municipal obligations, and are paid like other such obligations. No special assessment is provided to cover the amount. Part III of the act provides a procedure for changing the grade of streets. As we have already seen, the constitution provides that private property shall not be taken or damaged for public use without compensation. A change of grade frequently causes damage. Hence the act provides for the assessment of damages by commissioners, and the payment thereof by a special assessment levied upon a district according to benefits. It also authorizes the improvement of the street after the change is made. The assessment is collected by the city superintendent of streets, and is enforced by him by sale of the property subject to lien in a manner similar to that prescribed for the enforcement of state and county taxes. The disadvantage of the procedure lies in the fact that damages must be paid at the time of the change of the paper grade, whether the work is actually done or not. It is clear that the damage does not accrue until the work is done. To overcome this, the Change of Grade Act of 1909 prescribes an alternate procedure for changing the paper grade, allowing no damages. The work, when done, is performed under the Street Improvement Act of 1909, which provides for the assessment of damages upon the actual doing of the work. In 1909, the Sidewalk Act was passed, repealing the Vrooman Act so far as it related to sidewalks. In 1911, however, the Sidewalk Act was repealed, and the sidewalk provisions of the Vrooman Act were re-enacted.

§ 39. **Same—Bond Act.**—The exact title of the Bond Act is, "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 7, 1893. This

act is supplementary to the Vrooman Act, and applies to work authorized by that act. When the council so decides, bonds may be issued to cover each unpaid assessment of twenty-five dollars or more. These run for a period of years, and each is a lien upon a particular parcel assessed. These bonds are delivered to the contractor. In case of nonpayment of principal or interest, the property liable may be sold by the city in a manner similar to that prescribed for the sale of property for nonpayment of state and county taxes. An owner who does not desire a bond issued may give notice, and in such event the assessment must be enforced by suit in the same manner as under the Vrooman Act. The great advantage of this act to the property owner is that he is enabled to pay the cost in installments. The disadvantage is that no provision is made for paying before the whole amount is due. In order to remove the lien from his property he may be obliged to pay interest for several years in advance. The Bond Act also provides for assessing the cost of certain work upon street railroads, and the issuing of bonds to cover the cost.

§ 40. **Same—Improvement Act of 1911.**—The Improvement Act of 1911 is a combination of the Vrooman Act and the Bond Act. It follows closely the procedure of these two acts, and authorizes the same work. It was originally intended to supersede these acts. The changes are for the most part not especially material.

§ 41. **Same—Local Improvement Act of 1901.**—The Local Improvement Act of 1901 is intended to provide an alternate procedure for doing the work authorized by the Vrooman Act. It also makes provision for maintenance of the work. In a sense, it is a combination of the Vrooman Act and the Bond Act; but the procedure is very different. The council receives an estimate of the cost from the city engineer, and a report as to benefits. It thereupon makes the assessment, which is collected by the tax collector, and enforced by sale

in much the same manner as sales are made on execution. Before sale, however, owners may sign waivers of defects and agreements to pay in installments. These are liens upon the property. Bonds are thereupon issued for an amount corresponding to the amount of the agreements, are sold, and the proceeds paid into the treasury. The bonds are secured by all of the agreements. Upon default in the payment of principal or interest, the holder is entitled to have property covered by agreements, upon which default has been made, sold. After the money is in the treasury, the work is done. The disadvantage of this act to the owner is that he must pay his assessment before the work is done, unless he elects to pay in installments. The advantage to him is that he may pay in installments. The advantage to the contractor is that he is sure of an early payment of the contract price upon completion. Another feature of advantage to him is that suits to contest an assessment must be brought before the work is commenced. The disadvantage is that the act has not been frequently passed upon by the courts.

§ 42. **Same—Change of Grade Act of 1909.**—The Change of Grade Act of 1909 is intended to provide an alternate procedure for changing established grades. It does not apply to the original establishment of grades. A unique feature is that it does not provide for an assessment. This is made unnecessary by the fact that it merely provides for the change of the paper grade, and not for the actual doing of the work. In this, it has advantages over the change of grade provisions of the Vrooman Act, which require an assessment of damages at the time the paper grade is changed. Where the work is to be actually done upon the ground, the Street Improvement Act of 1909 provides for an assessment of damage.

§ 43. **Same—Street Improvement Act of 1909.**—The Street Improvement Act of 1909 provides a procedure for

making street improvements in cases where damage to property will result. It is supplementary to the Change of Grade Act of 1909, and provides for the actual doing of the work after the paper grade is changed. It is not limited to such cases, however. It applies to all cases of general street improvement where damage will result. The preliminary procedure is similar to that of the Vrooman Act. The matter of damages in cities where there is a board of public works is referred to that board and in other cities to three commissioners. They assess the damage and report. The legislative body awards the contract, and reports the price to the commissioners, who thereafter make an assessment. The legislative body has revisory power, both as to the amount of damages and as to the assessment. The assessments are collected by the tax collector, and enforced by sale. After the money is in the treasury, the owners to whom damages have been awarded are notified that warrants are ready, and the contractor is notified to commence work. If any owner refuses to accept the amount awarded, the legislative body may cause proceedings to be commenced against him in the Superior Court to have the amount determined. The contractor is paid out of the fund in the treasury upon completion of the work. Payment of the assessment before the doing of the work is essential in this class of acts, for the reason that damages must be paid before the work is done.

§ 44. **Same—Tree Planting Act.**—The scope of the Tree Planting Act is indicated by its title. It is "An act to provide for the planting, maintenance and care of shade trees upon streets, lanes, alleys, courts and places within municipalities, and of hedges upon the lines thereof; also, for the eradication of certain weeds within city limits," approved March 11, 1893. In a general way, the procedure is similar to that of the Vrooman Act. After the work is done, the city assessor makes an assessment, apportioned by the front-

foot method, to which is attached a warrant authorizing the contractor to collect. Payments to the contractor are to be made in installments, not more than one-half being payable at the completion of the work, one-quarter eighteen months thereafter, and one-quarter three years thereafter. Payment is enforced by a suit to foreclose the lien, in the same manner as is prescribed by the Vrooman Act. This act applies only to such cities as shall, by vote of the electors, decide to come within its provisions.

§ 45. **Same—Street Lighting Act.**—The Street Lighting Act of 1905 authorizes the city council of any municipality "to order poles, posts, wires, pipes, conduits and lamps, or any of said appliances, or any other suitable or necessary appliances, to be installed in and along the whole or any part of any public street, lane, alley, court or place in such municipality, for the purpose of lighting the same; also to order appliances in and along the same, installed under this act, or otherwise installed and owned or controlled by such municipality, to be maintained; and also to order gas, electric current, or other illuminating agent, to be furnished for such lighting." The procedure is somewhat similar to that prescribed by the Local Improvement Act of 1901. The cost is assessed upon a district according to benefits. The assessment is collected by the tax collector, and is enforced by sale of the property.

§ 46. **Street Opening Act of 1889.**—The Street Opening Act of 1889 provides for the laying out, opening, extending, widening, straightening, or closing up in whole or in part, streets, squares, lanes, alleys, courts or places within municipalities. It involves both the exercise of the power of assessment and the power of eminent domain. The council appoints three commissioners, who assess benefits and award damages. After approval by the council, the superintendent of streets collects the assessment, and enforces it by sale of property. When sufficient money is on hand, persons

whose property is to be taken are notified that warrants are ready. If they refuse to accept the amount awarded, the city may bring an action to condemn. The act does not authorize the improvement of the street after it is opened. This act has been passed upon by the courts in a number of cases, and its procedure is well understood. One disadvantage is that it is possible to allow exorbitant fees to the commissioners and to their employees. To remedy this, the charters of some of the cities of the state provide that the work of the commissioners shall be done by certain public officials without cost. Under the general law, the commissioners may be paid by the month. The result is that an ordinary street opening proceeding is likely to require a number of months for completion.

§ 47. **Same—Street Opening Act of 1903.**—The Street Opening Act of 1903 provides an alternate procedure for the work authorized by the act of 1889. An action to condemn the property necessary to be taken is commenced in the Superior Court. If the owners waive a trial by jury and by the court, the amount of damages is determined by referees appointed by the court; otherwise, it is determined by the court or jury, according to the demands of the defendants. The court has revisory power over the award of the referees. After the amount of damages is determined, an assessment is made according to benefits, and is collected by the street superintendent. Payment is enforced by sale. After the money is in the treasury, the amount of each judgment must be paid to the parties entitled thereto, or into court for their benefit. Thereupon, a final judgment of condemnation is entered. This act is particularly advantageous in cases where questions may arise as to the award of damages. Under the act of 1889, the amount must be determined in the first instance by commissioners, may then be decided upon by the council on appeal, and may then go to a jury. Under the act of 1903, the entire matter is determined in one proceeding.

PART II.
STREET IMPROVEMENT ACTS.

CHAPTER I.
THE VROOMAN ACT.

DIVISION 1.
PROCEEDINGS TO ACQUIRE JURISDICTION TO ORDER WORK.

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§ 48. **History of the Act.**—In 1883, Senator Henry Vrooman, a leading Oakland lawyer of a generation ago, introduced in the legislature a bill providing a procedure for the improvement of streets within the municipalities of the state.[1] This became known as the first Vrooman Act. Owing to the constitutional provision then in force requiring all assessments to be levied according to benefits, and prohibiting the award of contracts prior to the time the money to pay for the work should be on hand,[2] this first act adopted a district plan of assessment, and followed the constitutional requirement as to the contract. In 1884 the provision of the constitution referred to was repealed. In 1885 the same senator introduced a second bill, repealing the first and adopting a new procedure.[3] This was the second and present Vrooman Act, now known generally merely as the Vrooman Act. Its amendment has been a

1 Stats. 1883, p. 32.

2 Const., art. 11, sec. 19.

3 This act was probably modeled on one of the San Francisco consolidation acts: See Stats. 1871–72, p. 804.

As to validity of the constitutional amendment, see Oakland Pav. Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801. Compare Oakland Pav. Co. v. Hilton, 69 Cal. 479, 11 Pac. 3.

favorite pastime of succeeding legislatures, few having failed to change it in some particular. Thus, it was amended in 1887, 1889, 1891, 1893, 1899, 1903, 1905, 1907, 1909 and 1911. Because of these frequent changes, it is necessary to read the decisions interpreting the act with great care.

§ 49. **Divisions of the Act.**—The Vrooman Act is divided into three parts. The first, which is the one most used, provides for general street work, to be paid for by an assessment upon property benefited by the improvement, or by an appropriation out of the municipal treasury. This part also provides a procedure for the repair of streets. The second part provides for paying the cost of sewer work out of the municipal treasury, and authorizes the issuance of municipal bonds to cover the cost. The third part provides a procedure for the change of established grades, and the actual work of making the change upon the ground. The procedures provided by the several parts are different, and will be considered separately.

§ 50. **Jurisdiction Conferred by the Act.**—Section 2 prescribes the work which the city council is authorized to order. It provides:

"Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any portion, either in length or width, of any one or more of the streets, avenues, lanes, alleys, courts, places, boulevards, highways, crossings, intersections or public ways of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and to order the construction or reconstruction therein of sidewalks, crosswalks, culverts, bridges, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either

or both thereof, with outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection, tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water, and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting the same, the planting of trees thereon and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places or public ways or property or rights of way of such city."

The only limitation upon the jurisdiction is that the public interest and convenience shall require the work. The determination of this rests exclusively with the council and will not be inquired into by the courts. The council "has full power to determine whether work of any class designated in section 2 of the act is required upon any street, or portion of a street, by the public interest or convenience, and to order the same done in the manner provided by the act. The mere fact that work of some other class than that ordered has already been done on the street cannot affect this power. Although once macadamized, the public in-

terest or convenience may require that a street be paved with bituminous rock. The determination by the board of supervisors that the public interest or convenience does so require is conclusive, at least in the absence of fraud."[4]

The council may, if it sees fit, order the improvement of only a portion of a street lying between two main street crossings, and may confine the improvement to a portion of the street on one side of its middle line.[5]

§ 51. **Effect of the Sidewalk Act.**—In 1908 the Supreme Court decided the case of Millsap v. Balfour,[6] and by way of dictum declared that under the Vrooman Act property on both sides of a street was assessable for sidewalk work on one side, notwithstanding the fact that work on one side had already been done. To overcome the effect of this decision, the legislature of 1909 passed the so-called Sidewalk Act.[7] In 1910, the case of Millsap v. Balfour[8] again came before the Supreme Court on a second appeal, and the court then overruled its dictum in the first case. The effect of this was to make the Sidewalk Act unnecessary. The Sidewalk Act in express terms repealed the Vrooman Act so far as it related to sidewalks. The legislature of 1911 repealed the Sidewalk Act, and provided: "The repeal of said act shall revive each and every portion and provision of the act entitled, 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, and the several acts amendatory thereof and supplementary

4 San Francisco Paving Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Wells v. Wood, 114 Cal. 255, 46 Pac. 96; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885. See, also, Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078. The council is to decide upon the wisdom of the improvement: Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

5 McDonald v. Conniff, 99 Cal. 388, 34 Pac. 71.

6 154 Cal. 303, 97 Pac. 668.

7 Stats. 1909, p. 167.

8 40 Cal. Dec. 473.

thereto, relating to sidewalks, and the construction thereof, and to the assessments to be made, and the enforcement of payments for the expense of the construction of such sidewalks, and all other provisions thereof repealed expressly or by implication by the act hereby repealed, together with the provisions of all acts and parts of acts repealed expressly or by implication by the act hereby repealed." It is questionable whether the title of the repealing act is sufficient to enable it to revive another act. The repeal of a repealing act does not, in general, re-enact the original act.[9] However, the legislature of 1911 amended section 2 of this act, expressly authorizing sidewalk work; and I am of the opinion that this authorizes the construction of sidewalks under the Vrooman Act procedure.[10]

§ 52. Act Applicable Only to Public Streets.—The Vrooman Act, by its express terms, purports to apply only to

[9] People v. Hunt, 41 Cal. 435; Thomason v. Ruggles, 69 Cal. 470, 11 Pac. 20; Yolo County v. Colgan, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403.

[10] The legislature of 1909, after passing the Sidewalk Act, amended section 2 of the Vrooman Act, re-enacting the sidewalk provisions. This came before the Court of Appeals in City of Los Angeles v. Lelande, 11 Cal. App. 302, 104 Pac. 717. The court said: "The amendment of section 2 by the act of April 21st did not operate to restore sidewalk construction to the improvements authorized to be made under the Vrooman Act. Here, as in the case cited, it is apparent that, in so far as the amendment to the general law is concerned, the fact that it in any manner mentions the subject matter of the special act is due to a matter of copying. In the case at bar this may be attributed either to inadvertence or to an oversight on the part of the judiciary committee to which the amendment was referred, who failed to eliminate the word 'sidewalks' from the section and thus make it conform to the other legislation on the same subject at the same session of the legislature. The evident and apparently sole purpose of the amendment was to strike from the section the clause relating to change of grades, which had been elsewhere and otherwise provided for." This reasoning, however, does not affect the text, for the amendment of 1911 is more comprehensive, and its evident purpose is to enlarge the scope of the act. Moreover, the giving it the suggested construction does not destroy the effect of any other act.

"public streets, lanes, alleys, places, or courts." Hence, independently of whether the legislature could in any case provide for a local assessment for the improvement of private property, it is clear that under this act only public property can be improved. It follows that proceedings to improve a private street are beyond the jurisdiction of the council, and are therefore void.[11] Where it is possible to construe the proceedings as intending to do the work only on the public portion of the street, the proceedings will be upheld.[12]

§ 53. **Definition of Street, Lane, Alley, etc.**—A street, strictly defined, is a paved way or road.[13] As the term is generally used, it includes all urban ways which can be and are generally used for the ordinary purposes of travel.[14] It means more than the surface; "it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purpose of a street."[15] In general, the word includes the entire width of the way, including the roadway and the sidewalk; and it is in this sense that the word is used in sections 1 and 2.[16] At times, how-

11 See ante, sec. 17, and cases there cited. See, also, Spaulding v. Bradley, 79 Cal. 450, 22 Pac. 47.

12 In Oak Hill Water Co. v. Gillette, 13 Cal. App. 605, 110 Pac. 316, the resolution of intention provided for the improvement of Glenarm street from the east line of Fair Oaks avenue to the original east boundary line of the city. Certain lots extended ten feet into the street, and were improved by the contractors. The court held that the resolution should be construed as calling for the improvement only of the public portion of the street, and that the proceedings were valid.

13 Brace v. New York Cent. R. Co., 27 N. Y. 269.

14 Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288; Duval County Commrs. v. City of Jacksonville, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416. For other definitions, see "Words and Phrases," tit. "Street."

15 Coverdale v. Charlton, L. R. 4 Q. B. D. 104.

16 The word "street" was held to mean the entire way in Bonnet v. City and County of San Francisco, 65 Cal. 230, 3 Pac. 815; Marini

ever, it is used to denote the roadway, as distinct from the sidewalks. The context must be considered in determining which use is intended.

An alley is a narrow street,[17] and a lane is defined as a narrow way.[18] Court is synonymous with park and square.[19]

The seventh subdivision of section 34 provides: "The word 'street,' as used in this act, shall be deemed to, and is hereby declared to, include avenues, highways, lanes, alleys, crossings, or intersections, courts and places, and the term 'main street' means such actually opened street or streets as bound a block; the word 'blocks,' whether regular or irregular, shall mean such blocks as are bounded by main streets, or partially by a boundary line of the city."

§ 54. **Definition of "Public Street."**—Section 1 defines a public street as "one now open or dedicated, or which may hereafter be open or dedicated to public use." Such streets are declared public "for the purposes of this act." Two classes are here indicated—dedicated streets and opened streets. It is clearly not competent for the legislature to make a private street public by a mere legislative declaration;[20] but it is competent for the legislature to determine

v. Graham, 67 Cal. 130, 7 Pac. 442; Ex parte Taylor, 87 Cal. 94, 25 Pac. 258.

That the word is used is in its broader sense in the first two sections is shown by the context. The reference to streets open and dedicated is alone sufficient to indicate the meaning in the first section, for the dedication refers to the entire way. Moreover, when the two sections are read together it is clear that the legislature intended to provide for the improvement of the entire way. Section 2 provides for the paving, etc., of streets and for the construction of sidewalks, manholes, etc., "therein." The word "therein" shows clearly that by the word "street" the entire way is meant.

17 Bailey v. Culver, 12 Mo. App. 175.

18 Indianapolis & C. R. Co. v. McClure, 26 Ind. 370, 89 Am. Dec. 467.

19 Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282.

20 See Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

what acts shall make a street public. Interpreting this provision the Supreme Court has said: "The evident object of the first section of the statute of 1885 was to enlarge the term 'street' so as to include, not only those that had been opened, but those also dedicated to street purposes, although not formally or officially accepted or opened as such. The effect was simply to make streets of a class which might not otherwise come within that category."[21]

§ 55. Outline of the Procedure.—In outline, the procedure under the first part of the Vrooman Act is as follows: (1) The council must pass a resolution of intention. (2) This must be posted for two days on or near the council chamber door, and must be published by two insertions in a newspaper. (3) Thereupon, the superintendent of streets must cause notices to be posted along the line of the improvement, and to be published for six days. (4) Within ten days after the expiration of the period of the publication, the owners of a majority of the frontage may file a protest. In some cases this is a bar; in others not. In certain cases where it is not a bar, a hearing must be had. Provisions are also made for a petition of remonstrance and for objections to the district, upon both of which hearings must be had. (5) If no protests are filed within the time allowed, or if all objections are overruled, the council may, at the expiration of a period fixed, pass a resolution ordering the work. (6) The resolution ordering the work must be published for two days. (7) Notice calling for bids, with specifications, must be posted for five days, and a notice must be published for two days. The contract may be awarded to the lowest responsible bidder, but the award

[21] Bituminous Lime Rock Pav. & Imp. Co. v. Fulton (Cal.), 33 Pac. 1117.

In an early case, under a somewhat similar statute, it was held that there is no necessity for a formal acceptance: Stone v. Brooks, 35 Cal. 490.

must be approved by the mayor or by a three-fourths vote of the council. Notice of the award of contract must be posted for five days and published for two days. (8) The owners of three-fourths of the frontage may elect to take the contract within ten days from the first publication and posting of the notice. (9) If they fail to do so, the superintendent of streets must enter into a contract with the person to whom it was awarded. The contractor must file a bond to secure performance, and a bond to secure payment of laborers and materialmen. (10) After the work is done and accepted, the superintendent of streets must make an assessment, to which must be attached a diagram and warrant, which must be recorded. A lien then attaches. Unless the resolution of intention provides for the assessment of the cost upon a district, the assessment must be made according to frontage. (11) The contractor, or some person on his behalf, must call upon the persons assessed and demand payment. A return must be made upon the warrant within thirty days from its date. Thereupon, the return and the original contract must be recorded. (12) The contractor may enforce the lien of the assessment by a foreclosure suit.

§ 56. **Constitutionality.**—The constitutionality of the Vrooman Act has been upheld in a long series of cases. The point most frequently urged has been that the front-foot method of assessment is invalid, because it is levied without regard to actual benefits. This matter has been discussed at length in an earlier chapter; and we have found that the courts have firmly established the validity of that method.[22]

22 See ante, secs. 6–14, for a full citation of authorities. See, also, Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Chapman v. Ames, 135 Cal. 246, 67 Pac. 1125.

§ 57. **Nature of the Work.**—"The work is a public work, undertaken by and on behalf of the public, and the public and not the adjoining property holder is, through the superintendent, the contracting party. The public controls the street as well as the work. It is the public interest that is especially consulted. The municipal government, through its officers, determines what improvements shall be made, when and how, and with what materials they shall be constructed; and it is for the officers having these matters in charge to determine whether the work has been executed according to the plans adopted, and the contracts entered into, in pursuance of the orders of the local government. The lot-holder, except as one of the public, is in no sense a party to the transaction. When the work is accomplished, for the purpose of defraying the expense, the municipal authorities levy an assessment upon the adjoining lands, by virtue of the sovereign right of taxation delegated by the legislature of the state to the local government for that purpose, and collect it through the contractor himself. The owner of the adjoining lot has nothing to say about it, provided there is no fatal informality in the proceedings, except so far as his wishes are consulted in the first instance, as to whether or not the municipal authorities shall undertake the work, and so far as he is heard through his representative in the board of supervisors. The city makes no contract for him individually. The liability arises out of no agreement, express or implied, between him, in his individual character, and the street contractor. He simply pays because the burden has been imposed upon him in common with other citizens, and he cannot help himself, as he pays any other common public burden imposed under the sovereign power of taxation."[23]

§ 58. **Rule of Construction.**—In 1911, section 53 was amended to read as follows:

[23] Emery v. Bradford, 29 Cal. 75.

"This act shall be liberally construed to the end that its purposes may be effected. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any proceeding taken hereunder which does not directly affect the jurisdiction of the city council to order the work or improvement shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided."

The evident purpose of the amendment is to prescribe a more liberal rule of construction. It is doubtful, however, whether anything is accomplished. It will be noted that an appeal is said to be the exclusive remedy. As we shall see later, the appeal allowed by section 11 is strictly limited, and the jurisdiction of the council is confined to matters which it can correct.[24] The new section does not attempt to extend the jurisdiction of the council on an appeal. Moreover, language as strong as this has been in section 11 for years, and has had no appreciable effect upon the construction of the act. It has always been held that an appeal is an exclusive remedy for matters within the jurisdiction of the council to correct on appeal.

§ 59. Necessity for Establishment of Grade.—Section 1 authorizes the council to establish and change the grades of streets. This means to fix the so-called paper grade—to determine just what the grade shall be when the work is done upon the ground. The fixing of a grade is a preliminary to ordering street work. Until the grade is officially established, the contractor cannot know where to do the work; nor can the superintendent nor the council determine that it has been properly done. Hence, unless a grade has been fixed, there can be no recovery for work done.[25] Where the

[24] See post, secs. 262, 263.

[25] Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537. The power to fix the grade would be implied from the authority to grade the street,

grade has been once fixed, however, the fact that there is an uncertainty as to it will not prevent a recovery. The owner's only remedy in such a case is by appeal to the council.[1] While the grade must be fixed before the work is ordered, and while of necessity grading must be done before a street can be paved on the official grade, it is not essential that grading be actually done before paving is ordered. Both may be ordered in the same proceeding.[2] "Of course, in such cases, although the contract for grading may be valid, there is still a contingency as to whether the work will be performed. If the grading be not done, the contract for macadamizing must fail. If the grading fail because the contractor is not legally bound, it will be no worse than a failure for any other reason. After a street is graded, though under a void contract, the power to macadamize would be the same."[3] In an early case it was held that a contract for macadamizing may be let before the street is graded.[4]

§ 60. **Method of Establishing Grades.**—The original paper grade is ordinarily fixed by municipal ordinance. The sufficiency of such ordinances has been considered in several cases. In one case it was enacted that the "grades of the streets and avenues mentioned shall be with reference to the base lines of the city grades, for the intersections named." The court said: "We understand this to be the usual mode of designating grades for streets, and that it

even without the express declaration of section 1: Himmelmann v. Hoadley, 44 Cal. 213.

1 Warren v. Riddell, 106 Cal. 352, 39 Pac. 781.

2 Emery v. San Francisco Gas Co., 28 Cal. 375; Dyer v. Hudson, 65 Cal. 374, 4 Pac. 231; Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467.

3 Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467.

4 Dyer v. Hudson, 65 Cal. 374, 4 Pac. 231. In Knowles v. Seale, 64 Cal. 377, 1 Pac. 159, it was held that the board of supervisors might order a street planked before it had been actually graded.

fixes the grade not only at points specifically mentioned, but at all points intermediate, by simply connecting the named points by a straight line."[5] This does not apply, however, unless the grade at each end of a block is fixed. Thus, in a later case, it appeared that the grade of the crossing at Eighteenth and Castro streets had been fixed, and also the grade at the crossing of Eighteenth and Diamond streets, two blocks away. The court said: "It is claimed by counsel for appellant that the fixing of a definite height of a street at two points itself fixes the official grade between such points to be an arbitrary straight line drawn between such points so established. But manifestly this cannot be correct. There is nothing in the record to sustain the contention, and anyone familiar with the topography of the city and county of San Francisco must see at a glance that such a rule would be inapplicable to the streets thereof."[6] In a suit to foreclose a street assessment, the plaintiff makes a prima facie case by introducing the assessment, warrant, diagram and certificate in evidence; and this is sufficient to establish, prima facie, that the grade has been fixed.[7]

§ 61. Right to Establish Subgrade.—The council may adopt a subgrade, to which grading may be ordered. "The grade of a street is the degree of its inclination from a horizontal line, and, as used in the Street Improvement Act, includes the height of its surface above the line of the established base; but it is entirely consistent with the establishment of the grade of a street that there be also established a subgrade for macadamizing; i. e., a line of elevation above the base to which the street is to be reduced prior to

[5] Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467. Under the Napa charter, a grade could be originally established only by following a prescribed procedure: See City of Napa v. Easterby, 61 Cal. 509.

[6] Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537.

[7] Blanchard v. Ladd, 135 Cal. 212, 67 Pac. 130.

laying thereon the material with which it is to be macadamized, since such subgrade may be upon the same line of inclination as the grade itself. If such subgrade has been established, it is an official grade for that purpose, and the work of grading the street to the subgrade may be ordered by the city council. Such an order indicates by its terms that it is only a portion of the work necessary for preparing the street for use, and that it is the purpose of the council to cause the street to be macadamized, upon the completion of which the whole surface of the street will be at the official grade. The establishment of a subgrade for this purpose is in harmony with the purposes of the statute, and is more consistent with its spirit than to require the street to be filled in to the official grade and then have a portion thereof removed for the purpose of preparing it for macadamizing."[8]

§ 62. **Right of Owner to Compensation upon Establishment of Grade.**—It is not necessary that the ordinance establishing the original grade make provision for the payment of damages to owners of abutting property. The damage results not from the establishment of the paper grade, but from the actual doing of the work upon the ground. An owner who is damaged by the doing of the work is entitled to compensation. It has been urged that there is a distinction between the right of an owner to damages for the original establishment of the grade and his right to damages for a change of grade. The Supreme Court has held, however, that there is no such distinction. In a leading case the court says: "The suggestion that when the owner dedicates his land for a street it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent

[8] Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, 1080.

change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation imposed by the constitution, to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the grading of a street would have the effect to increase, rather than diminish, the value of the lots adjacent thereto by making them accessible to the public; but if the municipality deems it desirable to establish a grade which will result in a damage rather than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged 'for public use.' "[9] Nonpayment of damages does not invalidate an assessment for street work.[10] The city

[9] Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750. As to what constitutes damage, see ante, sec. 5.

[10] See post, sec. 362.

is the party liable for damages. The contractor is not liable unless he departs from the official grade.[11]

§ 63. **Procedure for Change of Grade.**—Section 1 authorizes the council to change the grade of streets. This must be done in a manner different from that in which the original grade may be established. In 1893 the legislature added sections 38 to 53 to the act; and these provide an elaborate procedure to be followed in such cases. The procedure is discussed later.[12]

§ 64. **Resolution of Intention—In General.**—The first step in proceedings under the Vrooman Act is the adoption of a resolution of intention. Section 3 of the act provides that, before ordering any work done or improvement made, "the city council shall pass a resolution of intention so to do, and describing the work." No particular form of resolution is prescribed; but it is the initial and a jurisdictional step, upon which all the later proceedings depend.[13] Unless it complies substantially with the statute, all of the proceedings will be void. It becomes important, at the outset, to determine what formalities should accompany its passage, and what it should and should not contain.

§ 65. **Same—Form.**—Municipal corporations act either by ordinance or resolution. An ordinance is more formal than a resolution and prescribes a permanent rule for conduct or government. A resolution ordinarily is merely declaratory of the will of the corporation in a given matter.

11 See Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829.

12 See post, secs. 361–385.

13 Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266; Fay v. Reed, 128 Cal. 357, 60 Pac. 927. "No amount of particularity in following the statute in the subsequent steps can excuse a noncompliance with the provision requiring the board in its resolution of intention to describe the work": Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683. See, also, cases cited in subsequent sections.

Frequently, although not always, it is ministerial in its nature.[14] The charters of California cities, as well as the Municipal Corporations Act, provide certain formalities for the adoption of ordinances which do not apply to resolutions. For instance, it is customary to require a certain number of readings before the adoption of an ordinance, and, further, to provide that it shall not take effect until approved by the mayor or other executive head of the city. The Vrooman Act provides that the first step shall be a "resolution." Hence, it is not necessary that the formalities requisite for the adoption of an ordinance be followed; nor, in general, is it necessary that the resolution be approved by the mayor.[15] An ordinance includes a resolution; and therefore the council may, if it sees fit, adopt an ordinance of intention instead of a resolution.[16] The courts have not, as yet, passed directly upon the effect of charter provisions governing resolutions, adopted since the constitutional amendment of 1896 which made charters govern in municipal affairs.[17] For instance, the Berkeley charter provides

[14] For a good statement of the distinction between an ordinance and a resolution, see City of Alma v. Guaranty Savings Bank, 60 Fed. 203, 8 C. C. A. 564, 19 U. S. App. 622.

[15] McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909; Sacramento Pav. Co. v. Anderson, 1 Cal. App. 672, 82 Pac. 1069.

To the effect that under one of the old acts the resolution did not require the mayor's approval, see Cochran v. Collins, 29 Cal. 129; Beaudry v. Valdez, 32 Cal. 269; Taylor v. Palmer, 31 Cal. 241; Hendrick v. Crowley, 31 Cal. 471.

To the effect that under one of the old acts the resolution needed to be approved by the president of the board, see Creighton v. Manson, 27 Cal. 613; Thompson v. Hoge, 30 Cal. 179.

[16] Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

To the general proposition that an ordinance is the equivalent of a resolution, see City of Los Angeles v. Waldron, 65 Cal. 285, 3 Pac. 890.

[17] In Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057, the court said: "The street law provides a complete scheme or procedure for street work, and so far as it goes governs. The charter

that "all resolutions and ordinances shall be signed by the mayor and attested by the city clerk."[18] This, in terms, applies to all resolutions, and, it would seem, should be held to apply to resolutions of intention. It would seem clear, upon principle, that a valid charter provision prescribing the manner of adopting a resolution should be followed.[19]

§ 66. **Same—Record.**—It is not essential that the resolution of intention be copied in full in the records of the council. The original resolution may be filed and numbered, and be merely referred to by number in the minutes. Upon this point the Supreme Court has said: "A legislative body is not required to keep its minutes in any one book. Unless the law requires it, their enactments need not be there entered at all, but the minutes certainly should show what action was had upon them—that is, that they were enacted, and the enactments themselves should be authenticated in some mode. No special mode of authentication seems to have been provided, and although a mere reference by number to what is assumed to be a book of resolutions kept by the board is an unsatisfactory mode of identification, we cannot say that the resolution is thereby made invalid. The assessment being put in evidence makes a prima facie case. To rebut it the defendant must prove affirmatively the failure on the part of the board to perform some act essential to its validity. The minutes show the requisite action on

cannot make a different procedure by requiring more or less. Otherwise there would not be a uniform operation of the law for all cities of a class." This language was quoted in the comparatively late case of Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367. It is to be noted, however, that the first case was decided prior to the constitutional amendment of 1896, making charters govern in municipal affairs. We shall see that street work is a municipal affair. Hence, any charter provisions, subsequently adopted, limiting the operation of general laws, prevail; and the language quoted is not any longer strictly true.

[18] Berkeley Charter, sec. 44, subd. 9; Stats. 1909, p. 1229.

[19] For a discussion of the effect of the amendment of 1896, see post, sec. 806ff.

the part of the board. Some resolution corresponding in number was passed. It is a question simply of identification."[20]

§ 67. **Same—Right to Include Several Kinds of Work in One Resolution.**—Subdivision 13 of section 7 provides: "The city council may include in one resolution of intention and order any of the different kinds of work mentioned in this act." Accordingly, it is held that propositions for several kinds of work on one street, such as curbing, macadamizing, etc., may be included in one resolution.[21] The entire work constitutes one improvement, and the contract for it should be let as an entirety.[22] This does not, as we shall see, prevent abutting owners from filing a protest as to part of the work.[23]

§ 68. **Same—Right to Include Several Streets in One Resolution.**—A more difficult question arises as to the right of the council to include more than one street in one resolution of intention. Where the improvement is in reality one, as where a system of connecting sewers is provided for, it would seem clear that several streets may be included, and that the improvement is to be treated as one throughout the proceedings. In such a case there is no impropriety in imposing the entire cost upon one district. In an early case decided under another act, it was held that a proceeding for connecting sewers in streets intersecting at right angles

20 Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141.

21 Stimson v. Hanley, 151 Cal. 379, 90 Pac. 945; Pepper v. Neiman, 4 Cal. App. 55, 87 Pac. 286.

This was the rule under some of the earlier acts: See Dyer v. Hudson, 65 Cal. 374, 4 Pac. 231; Emery v. San Francisco Gas Co., 28 Cal. 346; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

22 Stimson v. Hanley, 151 Cal. 379, 90 Pac. 945; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081.

23 Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

constituted one improvement.[24] Moreover, it has been held that several streets in widely separated parts of the city may be included in one resolution; but that in such a case, separate contracts are to be let and separate assessments made. Upon this, the Supreme Court has said: "It may often happen that the public interest requires the improvement of streets situate in widely separated parts of the city, and, if so, no reason is shown or can be suggested why the board may not cause such improvements to be included in the same resolution of intention, without requiring them to be contracted for by the same individual. The designation by it of a street or a portion of a street which is to be improved, with a description of the work to be done thereon, becomes thereby a distinct and several improvement, whether it be the only improvement specified in the resolution of intention or in the resolution ordering the work, or whether other improvements are included with it. After the improvements have been ordered, their distinct and several character is to be observed in the subsequent proceedings."[25] A late case, interpreting the Local Improvement Act of 1901, applies a different rule to that act.[1] The case quoted, however, has not been overruled; and its correctness when applied to proceedings under the Vrooman Act was assumed in the later case. And the legislature of 1911 has, by an amendment to section 7, provided that work on several streets may be included in one resolution and one contract. It was undoubtedly intended by the amendment to make the law clearer; but it is by no means certain that the courts will hold that streets in widely separated portions of the

[24] See Mahoney v. Braverman, 54 Cal. 566. See, also, White v. Harris, 116 Cal. 471, 48 Pac. 382.

[25] Bates v. Twist, 138 Cal. 52, 70 Pac. 1023. See, also, San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Stimson v. Hanley, 151 Cal. 379, 90 Pac. 945.

[1] Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610. For a discussion of this case, see post, sec. 522.

city can be so united in one proceeding as to make property in one locality pay the expense of work in another.

§ 69. Contents of Resolution of Intention—Statement of Intention.—The resolution of intention should state an intention to do the work; but it is not necessary that it recite that the work is *necessary*. This is not essential even in sewer work done pursuant to section 27, which section provides that "whenever the city council deem it necessary to construct a sewer, then the city council may," etc.[2] Neither is it necessary to state in what manner the assessment is to be made, for that is prescribed by the act itself.[3] The passage of the resolution of intention is, in itself, a finding that the work is necessary.

§ 70. Same—Must State Official Name of Street.—The resolution of intention should state the official name of the street to be improved. This is jurisdictional. A designation by another name will render the proceedings void.[4] The

[2] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

[3] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

[4] Peck v. Stassforth, 156 Cal. 201, 103 Pac. 918. In this case the facts were as follows: In 1886 the owners filed a map designating the street as Otto street. In 1890 the council accepted the offered dedication. In 1894 the owners filed another map, upon which the street was called Davin street. In 1897 the city council passed an ordinance changing the name of Davin street to Savannah street. The resolution of intention was for grading, etc., Savannah street. The court held that Otto street was the true name and that the resolution of intention was void. In view of this decision, the language of the learned justice who rendered it, quoted by him in a decision rendered the next day from an earlier decision of his, is instructive. Quoting from Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53, he said: "Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to

theory is that a resolution stating the wrong name does not give notice to the owners of the property. In the case in which this was first decided, it was alleged that the owner did not have knowledge that the street was known by the name used. It may be inferred from this that the name used was not in general use. The purpose being notice, it would seem arguable that a designation by a name in common use should be sufficient; for such a designation would often give better notice of the street intended than the official name.

§ 71. **Same—Must State the Extent of the Improvement.** Not only must the resolution of intention state the official name of the street to be improved, but it must accurately state the extent of the work on that street.[5] The purpose of this is to enable owners to know where the improvement is to be made, so that they may act intelligently thereon. Hence, where the resolution provided for work on the intersection of three streets not having a common intersection, it was held that the description was not sufficiently definite.[6]

§ 72. **Same—Description of Work.**—A resolution of intention should sufficiently describe the work contemplated to convey an intelligent idea of the improvement and its nature and extent. It is by this action that the board is to be guided and the property owner is to judge whether he will protest against or acquiesce in the proposed improvement. It is not always sufficient to describe the work in the language of the statute. Upon this point it is said in a leading case: "Section 2 does not attempt to describe the work in any one instance; it merely enumerates, in a general way, the classes of improvements which the board is authorized to

the protection of the law as are the property owners themselves": McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924.

The case of Peck v. Stassforth was followed in Peck v. Bernard, 12 Cal. App. 559, 108 Pac. 55.

[5] Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590.

[6] Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590.

order made. Some of these convey sufficient description of their character and extent by naming them, while others do not. For example, the city council are empowered to order the whole or any portion of the streets, avenues, lanes, etc., 'graded or regraded to the official grade.' A resolution of intention to grade a street to the official grade, following the language of section 2 of the act, would be sufficient, for no one can doubt what is to be done. But the next power enumerated in the section is to order a street 'paved or repaved.' Section 3, as we have seen, provides that 'before ordering any work done or improvement made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, and describing the work,' etc. Notice of this resolution must be posted and must state therein 'briefly the work or improvement proposed, and refer to the resolution for further particulars.' Now, suppose in the present case the work resolved upon had been to pave the street, and the resolution of intention had simply been 'to pave the street,' and the notice had been given referring to the resolution for further particulars, what information would the property owner have obtained? He would not know whether the street was to be paved with cobble-stones, asphalt, wooden blocks, or some of the numerous composite pavement materials now in use. We think the words 'and describing the work' were introduced into section 3 for the obvious purpose of requiring the resolution of intention to set forth such a substantial description of the classes of improvements authorized by section 2 as would inform those interested not only of the particular improvement resolved upon, as, for example, paving a street, but would also inform them of what material it was to be built. And so of sewers, curbs, culverts, or other similar work, the naming of which does not of itself convey to the mind its description."[7]

[7] Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683. This case, in effect, overrules the earlier cases of Emery v. San Francisco Gas Co., 28 Cal. 376, and Deady v. Townsend, 57 Cal. 298, where the descriptions failed to come up to the standard here required.

§ 73. **Same—Must Describe All Parts of the Work.**—The requirement that the resolution shall describe the work applies to all and each of its material parts. A failure of description in any material part of the work vitiates the resolution as a whole, and renders void a bid and contract to do the work proposed by the resolution, inclusive of the defective part; and no street assessment can be enforced under such contract.[8]

§ 74. **Same—Each Kind of Work must be Separately Described.**—Each kind of improvement authorized by the statute must be separately described. The mere fact that but for the separate authorization, two kinds of work might be described together does not alter the rule. Thus, it is held that a resolution of intention to macadamize a street does not authorize curbing.[9] The Supreme Court said: "The question whether the term 'macadamizing' also includes 'curbing' is settled by the statute under which the parties having the matter in charge were working. The second section prescribes what street improvements the city council shall have power to cause to be made. Each kind is separately named and described. 'Macadamizing' is named as one, and 'curbing' as another. Hence, whether the former might or might not, under other circumstances, include the latter, is not the question. Does it, within the meaning of the statute under which the parties were working, is the question, and it is clear that it does not, for they are there mentioned as different and distinct kinds of street work, which circumstance shows that in the sense in which the former term is used in the statute it does not include the latter." The words used are to be given their ordinary meaning, however, in cases where the authorization does not require otherwise. Thus, a resolution of intention to macadamize a street au-

[8] Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; Fay v. Reed, 128 Cal. 357, 60 Pac. 927.

[9] Beaudry v. Valdez, 32 Cal. 269.

thorizes the construction of gutters of the same material;[10] but it does not authorize the construction of gutters of other material.[11] For instance, it does not authorize the construction of rock gutterways. Under an old statute, it was held that a resolution to curb and macadamize a street did not authorize the construction of sidewalks.[12]

§ 75. **Same—Must Specify Material.**—From the foregoing, it is clear that the resolution of intention must specify the material to be used in the improvement. Thus, a resolution that a certain street be sewered, without specifying the material, is void;[13] as is also a resolution that "culverts be constructed there."[14] A resolution that the street be "curbed, guttered, ... and that cross-walks be constructed across" certain streets named, "and that a culvert be constructed on the east side of San Pablo avenue, across Hopkins street," is fatally defective; and this description is not helped by a reference to specifications which do not expressly refer to that part of the work.[15] Likewise, a reso-

10 City Street Imp. Co. v. Taylor, 138 Cal. 364, 71 Pac. 446.

11 Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082.

12 Dyer v. Chase, 52 Cal. 440.

13 Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; Williamson v. Joyce, 137 Cal. 107, 69 Pac. 854; McDonnell v. Gillon, 134 Cal. 329, 66 Pac. 314.

In McDonnell v. Gillon, the resolution provided for one sewer of terra-cotta, one of ironstone, and two of vitrified salt-glazed ironstone. It then provided for a flush-tank, without specifying material or dimensions. It was contended that the flush-tank is a necessary part of a sewer, and therefore if the sewer is sufficiently described its several necessary parts are also described. The court held, however, that under the circumstances it could not tell of what material the flush-tank was to be built, and therefore held the resolution insufficient.

14 Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683.

15 Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299. A resolution of intention provided for the construction of gutters four feet wide in accordance with specifications contained in an ordinance referred to. This ordinance, however, provided for three kinds of gutters, and the resolution failed to designate which was referred to. The court

lution calling for paving with "class C" rock is insufficient when that rock is not clearly defined.[16]

It is not necessary that the resolution be sufficient, in its description of the work, to constitute specifications.[17]

Thus, a resolution for "additional macadamizing" or for "remacadamizing" is sufficient.[18] It is sufficient to state

held that there was a failure to describe the work: Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493.

A resolution "to sidewalk and curb" a street is insufficient: Crouse v. Barrows, 156 Cal. 154, 103 Pac. 894.

[16] Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266. In this case the court said: "The ordinance provides that class C shall be such rock as shall be approved by the board of trustees from time to time by sample, and it may consist of rock belonging to class A or class B, or such other kind of rock as may be approved by the board of trustees, but there can be no class C rock until it is approved and made so by the board of trustees. It is thus plain that when the resolution of intention provided that the macadam should be class C, the board of trustees might have determined by their order of approval the kind of rock that would constitute class C, which might have been a much more costly rock than class A or class B, or it might have been rock of class A, or class B, or it might have been a rock much inferior and cheaper than rock classified as class A or class B. The effect of the resolution of intention was that the street be macadamized with class A rock if approved by the board of trustees, or class B rock, if approved by the board of trustees, or any other kind of rock that might be approved by the board of trustees. It is at once evident that a contractor bidding for the work must have done so upon the probability of being compelled to use the most expensive rock for macadamizing, unless he had been assured in some way by some private arrangement that he might use other or different rock. The board of trustees were thus enabled to favor one contractor and discriminate against another. Whether the contractor could do the work for the amount of his bid, or whether he could make a fair profit, or a very large profit, in such case, would depend entirely upon the will of the board of trustees. The owner has a right to know, by the resolution of intention, the nature of the work contemplated, so that he, in common with other owners, may determine whether or not he will favor the contemplated improvement, or file written objections thereto. He has a right to have the work described so that the contractor may calculate the cost of the work, and that there may be fair competition among bidders."

[17] Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299.

[18] Oakland Paving Co. v. Rier, 52 Cal. 270; Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; Wells v. Wood, 114 Cal. 255, 46 Pac. 96.

that curbing shall be constructed of redwood, and gutters of rock.[19]

§ 76. **Same—Description in Alternative not Sufficient.**—Inasmuch as the description must be certain, a description of work in the alternative is not sufficient. Thus, a resolution providing that "said improvement to consist of the construction therein of granite *or* artificial stone curbing on both sides thereof" is void.[20] While such a resolution does not necessarily delegate authority, it is open to question in that regard; and there can be no question but that it is so uncertain as to give no notice to owners. A mere option, however, to use one of two classes of rock, of equal quality and cost, does not make the description fatally defective.[21]

§ 77. **Same—Need not but may Contain Plans and Specifications.**—It is not essential that the resolution of intention contain plans and specifications for the work.[22] A description of the work may be complete without either a reference to or an incorporation of plans and specifications. "The description of the work to be done may be placed in specifications annexed to the resolution of intention, of which they will then form a part, as well as in the body of the resolution itself. . . . . The ordinary function of specifications is, as the term imports, a statement in detail of the several parts of the improvement including a description of

[19] Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299. In Wells v. Wood, 114 Cal. 255, 46 Pac. 96, the following was held sufficient: "That Mission street, from Courtland avenue to West avenue, be graded to the official line and grade, that redwood curbs and rock gutterways be laid thereon, and that the roadway and sidewalks thereof be macadamized."

[20] San Jose Improvement Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859. See, also, Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266.

[21] Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620. Compare Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266.

[22] Harney v. Heller, 47 Cal. 15; Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635.

the manner in which the work is to be done."[23] It has been said that plans and specifications are superfluous and need not be followed; but this statement seems doubtful in view of the later authorities.[24] The resolution may be aided by a reference to the plans and specifications, so as to describe the work sufficiently.[25] It is not essential that specifications be physically annexed to the resolution.[1] If the specifications, for any reason, such as unlawful delegation of power, are void, the resolution incorporating them is also void.[2] A resolution of intention sufficiently describes the work if it states the kind of work to be done, as stated in the statute, and refers to plans and specifications on file in the office of

[23] Grant v. Barber, 135 Cal. 188, 67 Pac. 127.

[24] Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635. It was said in Grant v. Barber, 135 Cal. 188, 67 Pac. 127, that the plans and specifications may by reference become part of the resolution. See, also, Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53. Under such circumstances, it seems highly improbable that the court will hold that they may be ignored. While not essential, if they are part of the resolution they give notice of the character of the work; and it is difficult to see upon what theory they could be changed, any more than any other part of the resolution. In the following cases resolutions of intention were held insufficient because of defects in specifications: Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; Fay v. Reed, 128 Cal. 357, 60 Pac. 927.

[25] Grant v. Barber, 135 Cal. 188, 67 Pac. 127; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53. Compare Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299.

In Chase v. Trout, 146 Cal. 350, 80 Pac. 81, the court said: "The authorities of other states, with practical unanimity, establish the rule that a reference to plans and specifications on file will serve to make sufficient the description of the work in a resolution of this character, where, by the terms of the description in the resolution itself, it would be void."

But specifications not referred to cannot be used to aid the description: Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683.

[1] Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53. See, also, Williams v. Bisagno (Cal.), 34 Pac. 640 (reference to ordinance).

[2] Grant v. Barber, 135 Cal. 188, 67 Pac. 127; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266.

the city clerk or engineer, which give the details as to the materials to be used.[3]

§ 78. **Same—Need not Describe Work as Regrading, etc.** Section 2 of the act empowers the council to order streets to be "graded or regraded," "paved or repaved," "macadamized or remacadamized," etc. While this makes clear the intention not to confine the jurisdiction to original improvements, it does not require that the resolution of intention describe work as "regrading" or "repaving" or "remacadamizing." "The substantial nature of the work of grading and that of regrading is the same, namely, grading. The latter is only a repetition of the former. The statute requires only a description of the work; that is to say, an intelligible description sufficient to notify owners of lots fronting on the proposed improvement of the nature and extent of the work of which the improvement is to consist. It would add nothing material to such notice to inform the lot owners that work of the same kind, in the same place, had been done ten or fifteen years before, since they are bound to pay for a repetition of the work whenever, in the discretion of the board of supervisors, such repetition is deemed necessary."[4]

§ 79. **Same—Need not State That Work is to be Done to Official Grade.**—It is not necessary that the resolution of intention state that the street is to be graded or improved to the official grade. Inasmuch as all work is to be done to the official grade, the resolution will be construed as so intending.[5]

§ 80. **Same—May Except Work Already Done.**—Subdivision 13 of section 7 authorizes the city council to except

[3] Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

[4] Wells v. Wood, 114 Cal. 255, 46 Pac. 96. See, also, Oakland Paving Co. v. Rier, 52 Cal. 270.

[5] Emery v. San Francisco Gas Co., 28 Cal. 346, 376; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 128, 69 Pac. 89, 70 Pac. 1067.

from its resolution of intention "any of said work already done upon the street to the official grade." Hence a resolution of intention is not rendered invalid by excepting work "already done," or ordering work "where not already laid," or "where not already so paved."[6] Whether any portion of the work authorized under the resolution of intention has been already done, as well as the extent to which it has been done, are questions of fact to be determined by the superintendent of streets, subject to the right of appeal to the city council on the part of anyone aggrieved by his determination.[7] Nothing is, in fact, left to the discretion of the superintendent. The parts of the street to be excepted are definitely described by reference to unmistakable marks on the ground.[8] Not only may the council except work already done, but under the terms of section 7, it must except work, other than grading, already done, if it is in satisfactory condition.[9]

§ 81. Same—May Except Work Required to be Done by Railroad Company.—The Civil Code requires that the grant of a right of way to a street railroad corporation over a city street must require a strict compliance with the following condition: "Second. To plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street and with good crossings."[10] A resolution of intention to do work upon a street

[6] McDonald v. Conniff, 99 Cal. 388, 34 Pac. 71; Perine v. Erzgraber, 102 Cal. 236, 36 Pac. 585; Williams v. Bergin, 116 Cal. 59, 47 Pac. 877; Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141; San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

[7] San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

[8] Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

[9] De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

[10] Civ. Code, sec. 498.

in which there are street railroad tracks may except the part required to be kept in order by the company, and an exception reading, "except that portion required by law to be kept in order by the railroad company having tracks thereon," is valid.[11] The law explicitly defines that portion of the street, so that the description is certain.

§ 82. **Same—Delegation of Authority—In General.**—"The legislature of the state has conferred upon the legislative department of the government of any city the exclusive authority for the improvement of its streets. The legislative department of the city has no power to delegate to any other officer or body the authority to determine upon the necessity of making such improvement, or the character or extent of any improvement which it may itself direct to be made. . . . . Accordingly, it has been held that no valid assessment upon property can be made under an order directing the improvement 'where necessary';[12] or 'excepting such portions of the above-described work which have been already done in a suitable manner';[13] or for constructing curbs 'where the same are not now in good and sound condition';[14] or where, in constructing a drain, certain pieces of lumber were to be set 'at equidistant points of not more

11 San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Whiting v. Townsend, 57 Cal. 515. In the latter case the court said: "This is the requirement of a general statute, of which the court was required to take judicial notice, and of which every citizen is presumed *conclusively* to have knowledge. The meaning of the exception would not, therefore, have been rendered more certain if this provision of the code had been incorporated in it."

12 This proposition was determined by several early cases decided under an earlier act. The proposition is the same under the Vrooman Act: See Richardson v. Heydenfeldt, 46 Cal. 68; People v. Ladd, 47 Cal. 603; People v. Clark, 47 Cal. 456; Himmelman v. McCreery, 51 Cal. 562; Brady v. King, 53 Cal. 44; Randolph v. Gawley, 47 Cal. 458.

13 Foss v. Chicago, 56 Ill. 354.

14 Bryan v. Chicago, 60 Ill. 507.

than four feet';[15] or improving 'such portions of the sidewalks as the city engineer may direct';[16] or 'in such manner as the city superintendent shall direct.'"[17] In all these cases the description is uncertain, because it cannot be determined from the resolution itself just what work is to be done. The extent of the work is left to the discretion of someone other than the council. The invalidity is twofold; it is an improper delegation and it is a description which does not describe.

§ 83. Same—Same—Where Work can be Predetermined. The principles stated in the last section have been uniformly followed in cases where the work can be predetermined; and such is ordinarily the case in work done on the surface of a street. Accordingly, it has been held that a provision "that suitable drains and inlets are to be constructed at all intersecting street crossings to carry the surface water of intersecting streets and of Market street into the main branch sewer running along said Market street," makes the resolution of intention void.[18] Likewise, provisions that "the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate" in a pro-

[15] Village of Hyde Park v. Carton, 132 Ill. 103, 23 N. E. 590.

[16] Hydes v. Joyes, 4 Bush (Ky.), 464, 96 Am. Dec. 311.

[17] The quotation is from Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881. The last proposition cited is sustained by Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

[18] Fay v. Reed, 128 Cal. 357, 60 Pac. 927. "The number of intersecting streets crossed by the portion of Market street intended to be improved, of course, is certain; but whether there was intended to be constructed at each of these intersecting streets one, two, or three, or four inlets and drains is not fixed or determined, nor is the size of the drains specified, nor the material of which they shall be constructed, whether of wood, or cement, or brick, or stone, or iron pipe, or vitrified pipe, nor is the kind or character of the inlet by which the surface water is to be admitted to the drain in any manner described."

ceeding for surface work,[19] and that the contractor shall put in "such culverts as the street superintendent may direct,"[20] make a resolution of intention void. In the earlier cases, the same principle was applied to sewer cases, the court holding that the council must determine in advance the character of the soil and the amount of work necessary;[21] but the later cases, as we shall see in the next section, have limited its application. On the other hand, it has been held that a provision allowing a contractor a discretion to use one of two classes of rock, practically the same in quality and cost, does not render the resolution invalid.[22] In other words, a discretion given to the contractor which neither increases the cost nor affects the value of the work does not render the description void.[23] Again, a discretion given to the street superintendent to prescribe the exact location of a manhole does not render the proceedings void, especially in the absence of a showing that it will affect the cost.[24] Provisions that a "proper foundation shall be prepared by tamping the earth," and that depressions shall be filled with suitable material, do not improperly delegate discretion.[25] In the case last cited a distinction is attempted between such a delegation in the specifications and in the resolution of intention;

[19] N. P. Perine Contracting etc. Co. v. City of Pasadena, 116 Cal. 6, 47 Pac. 777.

[20] Grant v. Barber, 135 Cal. 188, 67 Pac. 127.

[21] Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881. In this case the court said: "It is not sufficient to say that the character of the ground in which the sewers were to be constructed was not known to the board of supervisors. It was their duty to cause its character to be examined before ordering the improvement, and not to leave the character of the improvement to depend upon the subsequent examination by some other officer." This case, however, is overruled in so far as it applies to work that cannot be predetermined without digging a trench, in McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924: See next section.

[22] Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620.

[23] Burns v. Casey, 13 Cal. App. 154.

[24] Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94.

[25] Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94.

but it is submitted that there is no real ground for distinction. If the delegation is proper at any time, it is proper at all times.

§ 84. Same—Same—Where Work cannot be Predetermined.—There has been a tendency in the more recent decisions to relax this rule to some extent in cases where the nature of the work does not permit of an accurate predetermination of the amount and character of material to be used. This is especially so in sewer work, where the amount of material necessary cannot be accurately determined until the digging of the trench. It is held, therefore, that specifications requiring the contractor to dig out sufficiently and put in enough concrete to make a solid foundation do not delegate authority and are valid.[1] Likewise, a specification has been upheld which provided that "when the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct."[2] Again, a specification requiring the contractor to excavate the trench to such increased depth as the street

[1] In Banaz v. Smith, 133 Cal. 102, 65 Pac. 309, the court said: "For instance, when the ground is wet, the soft earth is to be removed and gravel filled in; but the specifications do not determine the amount of wet, soft ground to be removed, or the quantity of gravel required to fill the excavation. It is not left to the street superintendent to say how much shall be done in any case. The contractor must do the work as required by his contract, and the street superintendent cannot accept less or require more." In Belser v. Allman, 134 Cal. 399, 66 Pac. 492, a specification was upheld providing that "under so much of said sewer as is to be constructed of brick and concrete, wherever the natural foundation is soft, spongy or springy, such natural foundation shall be removed down to a firm and solid natural foundation, and instead of the removed material there shall be placed and constructed a firm and durable foundation of broken rock and concrete."

[2] Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078.

superintendent may decide to be necessary has been upheld.[3] And in a recent case a specification providing that "if, in the judgment of the city engineer, it shall be necessary to form any portion of said foundation (of the sewer) of concrete, said concrete shall be paid for as extra work at the price per cubic yard mentioned in the contract," was upheld.[4] The reason for the rule is based upon the necessities of the case. The court, in the last case cited, pointed out that there are but three courses open to the council: (1) That adopted, (2) that of calling for a lump bid, but still leaving the discretion in the superintendent, and (3) that of letting the work in sections. It is clear that the first method is the most reasonable and satisfactory. It is to be noted, however, that in all of these cases the delegation is contained in the specifications and not in the resolution.[5]

[3] Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768.

[4] McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924. In this case the court said: "But where, as here, the work is the construction of a sewer, involving: 1. The digging of the trench, and 2. The placing of the sewer upon a durable foundation, it is apparent that but one of three courses can be pursued in the letting of the contract: First, the course here pursued, where the possibility of uncovering soil unsuitable in its natural state for the foundation was anticipated and provision was made that where such soil was encountered a concrete foundation should be constructed. Indisputably, the determination as to whether or not a concrete foundation would be necessary must be vested in some one. Indisputably, also, the proper person to determine this was not the contractor, but the street superintendent or city engineer. For the concrete which should be so required, the specifications provided that payment should be made at a given price per cubic yard. It could at once be determined whether this price was reasonable or unreasonable, and while the quantity which might be used could not be predetermined, the cost was fixed with all of the exactness which the circumstances permitted. If such a method—a method which would unquestionably be adopted by any private individual contracting for the doing of such work—is not permitted to a city, it must result in the city adopting one or the other of the methods hereafter considered." The court then proceeds to discuss the alternatives stated in the text, and shows that neither is so satisfactory as the method adopted. In this case, it was held proper to give the discretion to the city engineer.

[5] See Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94.

§ 85. **Same—Same—Effect of Provision for Superintendence of Work.**—In section 6 of the Vrooman Act it is provided that the work done "must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets." This provision does not authorize the delegation of any power to the superintendent of streets to determine the character of work to be done. The function of the superintendent is merely to determine whether the materials used and work done comply with the contract.[6]

§ 86. **Resolution of Intention for Work Done Under District Plan—In General.**—Section 3 of the act further provides: "Whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment-roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof." As this provision originally read, it was mandatory upon the council to pay all of the cost exceeding one-half of the assessed value out of the city treasury;[7] and this requirement could not be avoided by providing for sev-

[6] Grant v. Barber, 135 Cal. 188, 67 Pac. 127.

[7] Kreling v. Muller, 86 Cal. 465, 25 Pac. 10.

eral kinds of work in one resolution.[8] The provision as it now stands is not mandatory. The council is vested with discretion in the cases named to order the work charged upon a district, or to order it charged upon the abutting property in proportion to frontage.[9]

§ 87. **Same — Additional Statements.** — In proceeding under this provision, the council should incorporate in the resolution of intention, in addition to the matters heretofore mentioned, (1) a statement that in the opinion of the council the work is of more than local or ordinary public benefit, or (2) a statement that the total estimated costs will exceed one-half the total assessed value of the lands fronting on the

[8] Kreling v. Muller, 86 Cal. 465, 25 Pac. 10. But this could be done by several resolutions: Warren v. Postel, 99 Cal. 294, 33 Pac. 930.

[9] O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Ostrander v. City of Richmond, 155 Cal. 468, 101 Pac. 452. In the latter case this question was discussed in detail. Mr. Justice Melvin said: "While the courts have never hesitated to construe 'may' as 'must' or 'shall' when the context and the policy of the law demanded that interpretation, the legislative intention must plainly appear before such judicial correction will be made. . . . . Examining the statute before us, we find no special reason for the construction which appellant desires. Upon its face the act gives an authority which the trustees may or may not exercise. It may be that the front-foot plan is the only one whereby a just distribution of the burdens incident to the work of improvement may be accomplished. It may well be that in the present instance no land would be benefited save that fronting on Macdonald avenue. If such be the fact, surely the legislature never intended that the trustees should adopt such plan of assessment as would involve the declaration that a certain district would be benefited by the work, when, as a matter of truth, no benefit whatever would result to a part of the district. Surely it was never contemplated by the legislature that the trustees should stultify themselves for the purpose of providing a district plan of assessment. On the contrary, we must conclude that the legislature intended, by this enactment, to confer a wide discretionary power, and that the word 'may' as here used aptly contributed its part to the accomplishment of this design." The learned justice then proceeds to show that this position is supported historically, by the various amendments to the street laws.

improvement, and (3) a declaration and description of the district benefited. It is possible that the first and second statements are not jurisdictional.[10] The third, however, is jurisdictional; and unless the district benefited is declared and described, the board is without jurisdiction to act further.[11] The description of the district should be certain; but the law requires no greater certainty than is required in a conveyance.[12] The same rules of construction apply.

[10] See Banaz v. Smith, 133 Cal. 102, 65 Pac. 309. In this case it was held, under section 27 of the act, that it is not essential to state that the work is necessary. The same principle may apply here. It is to be noted, however, that there are two conditions under which the district plan may be used; and it might be held that the lot owners are entitled to know under which the council is acting. In answer to this, it may be said that the only point upon which the owners have a right to be heard is the extent of the district, and therefore the reason for the action is immaterial.

[11] Thomason v. Cuneo, 119 Cal. 25, 50 Pac. 846. See, also, German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

[12] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. See, also, Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825. In this case, however, the statute was quite different. It required that the petition "shall set forth and particularly describe the proposed boundaries of such districts," and the court intimated that this required a description by metes and bounds. There is no such requirement in the Vrooman Act.

In Dehail v. Morford, 95 Cal. 457, 30 Pac. 593, interpreting another statute with a similar provision, the court held the following description of the boundaries insufficient: "That the exterior boundaries of the district of land to be benefited by said improvement, and to be assessed to pay the damages, costs, and expenses thereof, are as follows: All lots and parcels of land fronting on each side of First street, from the west side of Los Angeles street to the west line of Alameda street; also all of the property of the railroads situated upon said First street between said points shall also be assessed to pay said costs, damages, and expenses." In discussing this the court said: "A very obvious reason for this requirement of the statute is, that each owner of property within the district may be informed of the extent of territory which is to bear the burden of the improvement, and thus, by calculating the relative burden upon himself, determine whether the burden to be borne by himself will be so disproportionate to the benefit of the improvement that he can make suitable representations to the city council when it comes to act upon the ordinance in pursuance of its resolution of intention. While each

Monuments and fixed points control courses, distances, and angles.[13]

§ 88. **Same—Extent of District.**—It is not essential that the assessment district include all the property fronting on the streets improved.[14] The extent of the district is not jurisdictional. Hence the council may, by its resolution of intention, fix a district including only the lots fronting upon the street.[15]

§ 89. **Publication and Posting of Resolution of Intention —In General.**—Upon the passage of the resolution of intention, the resolution "shall be posted conspicuously for two days on or near the chamber door of said council, and published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by the council for that purpose." The en-

owner of property may know the depth and area of his own lot within the district, he is not presumed to know that of the other lot owners, and consequently cannot know the relative proportion of the expense which he will be called upon to bear, and cannot intelligently make any objections before the council 'to the extent of the district of lands to be affected or benefited by said work or improvement,' which by section 4 of the statute he is authorized to make and have considered by it. Irrespective of such reason, however, it is sufficient reason that the legislature has prescribed this as a requirement to be observed by the city council, and one of the steps to be taken by it before it can have any jurisdiction in the matter, and it is a fundamental principle, in proceedings of this character, that every requirement of the statute which has a semblance of benefit to the owner must be observed, in order to give to the municipality jurisdiction in the premises. After the jurisdiction has once been acquired, subsequent proceedings can be attacked for only such irregularities as affect substantial rights, but for the purpose of acquiring jurisdiction every requirement must be regarded as of equal necessity."

13 Thomason v. Cuneo, 119 Cal. 25, 50 Pac. 846.

14 Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 54.

15 O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 54.

tire resolution should be both posted and published. It is not necessary, however, that the resolution as posted or published contain a statement of the yeas and nays by which it was adopted, unless the city charter so requires.[16] Neither is it necessary to state the date of the passage of the resolution; and the statement of an incorrect date does not vitiate the proceedings.[17] In the absence of express charter provisions, the charter rules as to the publication of ordinances do not apply.[18] The resolution must be published for the time prescribed; otherwise no jurisdiction is acquired.[19]

§ 90. **Same—Designation of Newspaper.**—Before publication, the council must designate the newspaper in which the resolution is to be published. This may be included within the resolution itself, or it may be done by separate resolution.[20] Such designation is jurisdictional. If the publication is made without designation, or in a paper other than that designated, the subsequent proceedings are unauthorized.[21] The courts will not strictly construe such a designation. If it will not mislead, it will be upheld. Thus, the following has been held good: "The 'Daily Bee' is hereby designated as the newspaper published and circulated in the city of Sacramento in which notice of the adoption of this resolution of intention shall be published."[22] While it is the resolution itself, rather than notice of the adoption

16 King v. Lamb, 117 Cal. 401, 49 Pac. 561. Under the original section, the resolution, if published, did not require posting: Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310; Gill v. Dunham (Cal.), 34 Pac. 68.

17 Vincent v. City of Pacific Grove, 102 Cal. 405, 36 Pac. 773. The publication stated that the resolution was passed September 7, 1880. In fact, it was passed September 7, 1890.

18 Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

19 Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

20 King v. Lamb, 117 Cal. 401, 49 Pac. 561.

21 Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414. In this case the designation was the Los Angeles "Times," but the publication was in the Los Angeles "Evening Express."

22 King v. Lamb, 117 Cal. 401, 49 Pac. 561.

thereof, which is to be published, the court held that no one could be misled. The designation of the newspaper amounts, in general, to a direction to publish.[23]

§ 91. **Same—Specifications Referred to in Resolution Need not be Published.**—We have already seen that the resolution of intention may refer to plans and specifications on file for a description of the work. "This does not make the plans and specifications referred to an integral part of the resolution so that they must also be published in order to comply with the statute requiring the publication of the resolution. This is but an application of the maxim, 'That is certain which can be made certain.' It applies not only to ordinances, but to all documents alike. It is the same rule which allows references to a map, plat, or to other documents in a description of land. Where such descriptions are required to be published,—as in a notice for a sale of land, for instance,—it is never necessary to incorporate in the publication the map or plat referred to in order to make a legal publication. The purpose to be served by the publication of the resolution is, in the first place, to inform interested persons of the general character of the improvement proposed, and, in the second place, to make a specific declaration of the particular kind of improvement, as a basis for future action. The plans and specifications being on file in a public office, both purposes will be as well accomplished by a mere reference to them as by setting them forth in full as a part of the resolution."[24]

[23] It was said by Temple, J., in Chambers v. Satterlee, 40 Cal. 497, that a direction to publish is essential. See, also, City of Napa v. Easterby, 76 Cal. 228, 18 Pac. 253. Contra, Wallace, J., in Chambers v. Satterlee. Whether a requirement by the board of a publication for more than the statutory period would make the publication for the longer period a prerequisite to the acquiring of jurisdiction is an open question. To the effect that it would not, see opinion of Wallace, J., in Chambers v. Satterlee, 40 Cal. 497.

[24] Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

§ 92. **Posting and Publication of Notice by Street Superintendent—In General.**—The next steps in the proceedings are the posting and publication of notice of the passage of the resolution. Section 3 provides: "The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing or any part thereof, in front of each quarter block and irregular block liable to be assessed, notices of the passage of said resolution. Said notice shall be headed 'Notice of Street Work,' in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated. In case there is no such paper published in said city, said notice shall be posted for six days on or near the chamber door of said council, and in two other conspicuous places in said city, as hereinafter provided." It will be noted that, as in case of the resolution of intention, the council must designate the newspaper in which publication is to be made.

§ 93. **Same — Time for Commencement.** — The notice should not be posted or published by the superintendent of streets until after the expiration of the period for posting and publishing the resolution of intention. A notice posted or published prior to such time would be of no avail. The word "thereupon" in the sentence, "The street superintendent shall thereupon cause to be posted," does not require that the posting shall be immediately after the former post-

ing and publication. "As used in that section, under these circumstances, the word 'thereupon' refers to the conditions precedent, and means that the publication by the street superintendent is to be made *upon those precedent conditions*, and necessarily implies that the publication by the superintendent of streets must follow the resolution of intention, and the publication thereof, in order of time. But there is nothing in the context or in the subject matter indicating that the six days' publication by the superintendent must *immediately* follow the two days' publication. That it should follow within a reasonable time is the most that should be claimed. It will hardly be contended that a delay of five or even ten days would vitiate all prior proceedings and necessitate a commencement thereof de novo. What would be an unreasonable delay in one case might be reasonable in another, under different circumstances."[25] In this case it was held that the court could not, on general demurrer, determine that a delay of two and one-half months was unreasonable.

§ 94. **Same—Contents of Notice.**—"The statute does not require an accurate and full description of the work to be contained in the notice. The evident object is an identification of the work, its locality, the fact of the passage of the resolution, and its date, with a reference to the resolution for further particulars. The statute evidently contemplates the existence of particulars in the resolution which are not contained in the notice; otherwise there would be no need of a reference to the resolution to obtain them."[1] Hence a notice which is precise as to the specific facts required by

[25] Porphyry Paving Co. v. Ancker, 104 Cal. 340, 37 Pac. 1050. See, also, California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

Where a resolution is posted on the sixth day of a month, the posting is complete on the seventh, so that the street superintendent may post and publish his notice on the eighth: Greenwood v. Hassett (Cal.), 61 Pac. 173 (not officially reported).

[1] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585.

the statute, accurately describes the portion of the street to be improved, and contains such brief description of the work as, with the reference to the resolution, will inform all parties in interest is sufficient.[2] Where the resolution of intention provides for one entire improvement on several streets, such as a connecting sewer system, the notices posted along each street must mention the entire work.[3] The reason is that in such a case the assessment is for the whole work, and each owner is entitled to know the extent of the work for which he is to be assessed. Where, however, the resolution of intention provides for several separate improvements, each one to have a separate assessment, the notices posted on each street need refer only to the work along that street or within the same assessment district.[4] The street superintendent may, instead of giving the substance of the resolution and referring to it for further particulars, print the resolution in full on the notice.[5] A property owner cannot

[2] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585. The resolution in this case provided "that granite curbs be laid on Locust avenue between Larkin and Polk streets, where not already laid; that bituminous rock sidewalks be laid thereon, where not already laid, and except where artificial stone sidewalks are now laid, and that the roadway thereof be paved with bituminous rock, where not already so paved." The words "be paved with bituminous rock" were omitted after the word "roadway" in the notice. The description was held sufficient.

[3] White v. Harris, 116 Cal. 471, 48 Pac. 382. In this case the court said: "It is contended further that no owner of property to be assessed could be damaged by the omission; this for the reason that the assessment being apportioned according to feet frontage, any extension of the sewer beyond a single street is accompanied by a corresponding extension of assessable frontage. But the conclusion appears unwarranted when we reflect that the laying of the sewer on one street may involve only excavation in sand, while in other streets it might require the filling of a morass or blasting of rock, to the material enhancement of the general cost."

[4] Bates v. Twist, 138 Cal. 52, 70 Pac. 1023.

[5] McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924; Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

In such a case the notice need not refer to the resolution for further particulars. Such a reference would be idle: Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

complain because the notice conveys to him more information than the law requires. The provision that the letters of the heading must be at least one inch in length mean that size vertically. The object is to have the headline so prominent as to attract attention, and so distinct as to be easily read at a reasonable distance.[6]

§ 95. **Same—Manner of Posting Along Line of Improvement.**—The act requires that the notices shall be "posted along the line of said contemplated work or improvement at not more than one hundred feet in distance apart." The entire street is the "line" referred to, although the work may be only on the sides. The section requires notices not more than one hundred feet apart *longitudinally* along the line of the improvement. "Notices posted on either side are notices posted on the line, and if such notices are not more than one hundred feet apart, measuring the distance along the center of the improvement, the section is complied with, it matters not upon which side of the center line the notices are actually posted."[7] Diagonal measurements are not to be considered. The line of improvement extends the whole length of the street between the boundaries named in the resolution of intention. Therefore, the fact that certain work is excepted by the resolution, as work already done, does not obviate the necessity for posting the entire distance.[8] It may, in such a case, be necessary to post in front of property not to be assessed. This rule, however, does not

[6] Williams v. Bisagno (Cal.), 34 Pac. 640.

[7] Pepper v. Neiman, 4 Cal. App. 55, 87 Pac. 286. In this case the resolution of intention provided for the construction of curbs, gutters and sidewalks on both sides of a street. Notices were posted on two sides of the street. They were less than one hundred feet apart measured longitudinally, but more than that measured diagonally. It was contended that there were two distinct lines of work provided for, but the court held that there was but one and that the whole street was the line. See, also, Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141.

[8] Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141.

apply where the description describes only the parts to be done, and omits all reference to the work already done. For instance, where the description mentions two blocks, describing each separately and omitting a block between, it is not necessary to post in front of the property omitted.[9]

§ 96. **Same—Manner of Posting in Front of Quarter Blocks.**—Section 3 requires posting along the line of the improvement, "or when the work to be done is only upon an entire crossing or any part thereof, in front of each quarter block and irregular block liable to be assessed." It is to be noted that this applies only in cases where the work is not more than one crossing. It is in the disjunctive, and is to be construed as a separate direction from that with which it is connected. Accordingly, where the work includes more than a crossing, it is not necessary to post in any place except along the line of the improvement.[10]

§ 97. **Rules as to Publications Under This Act.**—The publications required by the Vrooman Act are to be made in the regular issue of the paper once each day the paper is regularly issued.[11] If the paper is not published on Sundays or holidays, the publication is not defective if it is continued in the regular issue of the next day.[12] It is not necessary to publish in extra editions, although such extras are published on days upon which no regular edition is issued.[13] Where a

[9] Sacramento Paving Co. v. Anderson, 1 Cal. App. 672, 82 Pac. 1069. It was said in this case that posting in front of such property might tend to confuse, and would be of no benefit or information to those who would be liable for the work.

[10] Miller v. Mayo, 88 Cal. 568, 26 Pac. 364.

[11] Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772. See Vrooman Act, sec. 34, subd. 4.

[12] Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

[13] Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772. In this case the resolution of intention was published on July 3d and July 5th. The paper was not ordinarily published on July 4th, but on that day an extra edition, not numbered in the regular series of the volume,

paper is regularly published on Sundays, a publication on Saturday and Sunday satisfies a requirement of two publications.[14] The fact that a publication is commenced prematurely is immaterial, if it is continued for the proper length of time after the legal time for commencement.[15] Where the publication is required to be made for a certain number of days, as in section 3 where a publication of notice by the street superintendent is directed for six days, it is not necessary that the publication be made on six separate days. The requirement is satisfied by a publication in the regular edition of the paper every day during the period on which it is regularly published.[16] A newspaper published six days a week, every day except Sunday, is a daily newspaper.[17] The statute requires publication in a newspaper circulated in the city. Hence, a publication in a paper published but not circulated within the city is insufficient.[18] A publication in a supplement issued with the regular edition of the paper is valid.[19]

The fourth subdivision of section 34 provides: "The notices, resolutions, orders or other matter required to be published by the provisions of this act, and of the act of which this is amendatory, shall be published in a daily newspaper, in cities where such there is, and where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be

was issued for the purpose of selling on the street. The publication was held sufficient.

14 Smith v. Hazard, 110 Cal. 145, 42 Pac. 465.

15 California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

16 California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. See, also, Taylor v. Palmer, 31 Cal. 241, where a similar conclusion is reached as to an earlier statute. But see People v. McCain, 50 Cal. 210, where it was held that where the last day falls on Sunday, on which day no paper is issued, there must be a publication the next day. See, also, People v. McCain, 51 Cal. 360. In both of these cases the statute required publication exclusive of Sundays.

17 Richardson v. Tobin, 45 Cal. 30.

18 Haskell v. Bartlett, 34 Cal. 281 (a decision under an old statute containing a similar provision).

19 Lent v. Tillson, 72 Cal. 404, 14 Pac. 71.

designated by the council of such city, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that only in case there is no daily, semi-weekly or weekly newspaper printed or circulated in any such city, then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such city."

§ 98. **Proof of Posting and Publication.**—After notices are posted or published, affidavits showing the facts are filed with the city clerk. The fourth subdivision of section 34 provides: "Proof of the publication or posting of any notice provided for herein shall be made by affidavit of the owner, publisher or clerk of the newspaper, or of the poster of the notice."

§ 99. **Protests—In General.**—Section 3 provides for three distinct classes of protest: (1) The owners of a majority of the frontage of the property fronting on the proposed work or improvement, where the work is for one block or more, may make written objection; (2) any owners who feel aggrieved or have objections, although they may not own a majority of the frontage, may file a petition of remonstrance; and (3) objections to the extent of the district may be made by interested parties when the work is to be done on the district plan. In some respects the procedure is the same in all three cases; in others it varies. Hence it is important in all cases to note the particular protest which is being discussed.

§ 100. **Protests—Form—Who may Sign.**—"The protests contemplated by this statute are not required to be executed with any particular formality. They do not create any

burden or obligation, and are not to be executed with the ceremonies required for a transfer of real estate, or for creating a charge thereon."[20] In determining who is authorized to sign protests, section 16 must be read with section 3. Section 3 provides for protests by "owners" and "interested parties." Section 16 defines an owner as "the person owning the fee, ... or the person in possession . . . . under claim, or exercising acts of ownership over the same for himself, or as the executor, administrator, or guardian of the owner." Accordingly, it has been held that the protest may be signed by one cotenant; although it is undecided whether the entire frontage of the lands held in common, or only the proportionate share of the person signing, is to be counted.[21] Likewise, a signature by an executor is sufficient.[22] An officer of a corporation, authorized to supervise and control the affairs of the company subject to the board of directors, may sign on behalf of the corporation without further authority.[23] A signature by an agent, for the owner, made in his presence and at his request, is sufficient.[24] The authority need not be in writing, nor is it neces-

[20] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535. See, also, Barber v. San Francisco, 42 Cal. 630.

[21] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535. The court said: "One cotenant can at any time protect the entire estate from injury or loss without calling to his aid the assistance of the other cotenants, and his act will inure to their benefit. He can resist an intruder, or evict a trespasser, remove an encumbrance, or redeem from a burden, and since his acts in this behalf are in the interest of and for the benefit of his cotenants, their authority therefor, if necessary, will be presumed." The question as to the extent of the protest might arise if one cotenant should favor and another object to the improvement.

[22] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

[23] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535. Where a president is also general manager, and the by-laws confer the authority upon the general manager, the fact that this official signs as president is immaterial: Id.

[24] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

sary that evidence of authority accompany the protest.[25] When the council comes to consider the sufficiency of the protest, it may require the production of the authority, if challenged; "but if on its face a protest purports to have been signed on behalf of the owners of a majority of the frontage, a disregard of it by the council is at the risk of their future action in ordering the improvement being without their jurisdiction."[1]

§ 101. Protest Filed must be the One Signed.—The protest filed must be the one signed by the parties. It is not necessary that all parties sign one document. Several papers may be joined together and filed as a single protest;[2] and if together they represent a majority of the frontage, the work is barred, unless it comes within some of the exceptions. It is not permissible to circulate several protests, cut off the headings of all but one, paste the names together, and file as one document.[3] Such procedure would open the door to numerous frauds.

[25] Id. Civil Code, section 2309, provides: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

[1] Id.

[2] See McKinney v. County Commissioners, 26 Fla. 767, 4 South. 855, cited in People v. Town of Berkeley, 102 Cal. 298, 36 Pac. 591, 25 L. R. A. 593.

[3] Fox v. Board of Supervisors, 49 Cal. 563; People v. Town of Berkeley, 102 Cal. 298, 36 Pac. 591, 25 L. R. A. 593. In the case first cited, Crockett, J., said, referring to election petitions: "If numerous petitions with similar headings be circulated for signatures and if the headings from all the petitions except one be cut off, and all the names, without the knowledge and consent of the signers, be pasted to the one heading, and in that form presented to the board, it is clear that the paper thus presented was not 'signed' by those whose signatures were affixed to it by pasting. Whether they signed another paper with a similar heading will rest entirely in parol, and can only be ascertained by oral proofs. If such proof will suffice as to a portion of the petitioners, it will be equally effective as to all. We might then have the case of a petition never in fact signed by anyone; and the omission could be supplied only by oral proof

§ 102. **Protests—How Construed.**—"The rule that obtains with respect to proceedings against the property owner, and by which his property may be taken from him without his free consent, to the effect that all such proceedings must be construed with great strictness, and all requirements of the statute precisely followed, if they are of such a nature that by any possibility he might be prejudiced by a failure to observe them, is not applicable to this proceeding in the way of a protest by him. It is a proceeding in his favor, provided for the purpose of enabling him to prevent the taking of his property for a public improvement which he does not desire. There is no reason why this clause of the statute should not receive a liberal construction with a view to effect its object and promote justice, as provided in the Political Code."[4]

§ 103. **Protests—Indorsements on.**—The statute requires that the protest by the owners of a majority of the frontage "shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him." The protestants have done all that is required of them when they deliver the protest to the clerk. They are not required to see that the clerk does his duty and makes the indorsement. Accordingly the fact that he fails to make it does not impair the validity of the protest.[5] The statute does not require

that the petitioners had signed other similar petitions. If a practice of this kind was tolerated, it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing." The cases cited are not street cases. However, the principle is the same.

[4] City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666. See Pol. Code, secs. 4, 326. See, also, Barber v. San Francisco, 42 Cal. 630.

[5] City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666; Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262; Pacific Paving Co. v. Gallett, 137 Cal. 174, 69 Pac. 985. As to the general principle that a document is filed when delivered to the clerk, see Tregambo v. Comanche etc. Co., 57 Cal. 501.

that the indorsement, if made, be attested by the signature of the clerk; and hence his failure to sign is immaterial.[6]

§ 104. **Protests—Time of Filing.**—The protest of the owners of a majority of the frontage, when the work is done on the front-foot plan, and the protest to the extent of the assessment district, when the work is done under that plan, must be delivered to the clerk within ten days after the expiration of the time of the publication and posting of the notice by the street superintendent. The petition of remonstrance by parties aggrieved may be filed at any time after the first publication of the notice and before the issuance of the assessment-roll. The purpose of these provisions is to prescribe the time beyond which the protest cannot be made. Accordingly, a protest filed after the prescribed time is of no avail.[7] It is not necessary, however, to wait until the expiration of the period of publication and posting before filing the protest. It is not premature if filed after the first publication of the notice.[8] And, on principle, there would seem to be no reason why a majority protest should not be filed immediately after the passage of the resolution of intention.[9]

6 City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

7 Warren v. Russell, 129 Cal. 381, 62 Pac. 75. See, also, Burnett v. City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518.

8 Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262. See, also, Pacific Pav. Co. v. Gallett, 137 Cal. 174, 69 Pac. 985.

9 In Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262, the court said: "We can see no reason for holding that the lot owners may not file their objections as soon as the notice is published. There was an obvious purpose in limiting the time beyond which the owners could not object, but we can see no reason for providing that a protest must not be made until the notice has run the full six days, and we do not think the law should receive the construction contended for by appellants. The situation is not unlike that of a person holding a claim against an estate. He is required by the code to present his claim within the time fixed by the notice to creditors; but he may present it before notice to creditors is published." If the analogy to a creditor's claim holds good, and there is no reason why it should not, the statement in the text seems sound.

The express wording of the section seems to forbid the filing of the petition of remonstrance prior to the first publication.

§ 105. **Effect of Majority Protest.**—The effect of a majority protest is to bar all further proceedings under the original resolution of intention, and to bar the commencement of other proceedings for the same work for a period of six months. Work cannot be done under the original resolution of intention, even after the lapse of the period of six months.[10] No hearing is necessary when the council decides that the protest is a bar.[11] The statute provides, however, that the council may proceed where "any written objection purporting to be signed by the owners of a major frontage is disallowed . . . . because in its judgment, said objection has not been legally signed by the owners of a majority of said frontage." Where the protest does not import on its face to be signed by a majority, it is not necessary for the council to determine or enter of record its judgment that it is not so signed.[12] Where, however, the protest imports on its face to be signed by a majority, the council must determine that it is not so signed; and in the absence of such a

10 City Street Imp. Co. v. Babcock, 139 Cal. 670, 73 Pac. 666; City Street Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 762; Pacific Paving Co. v. Diggins, 4 Cal. App. 240, 87 Pac. 415; Union Paving Co. v. McGovern, 127 Cal. 638, 60 Pac. 169; Pacific Paving Co. v. Geary, 136 Cal. 373, 68 Pac. 1028; Pacific Paving Co. v. Sullivan Estate Co., 137 Cal. 261, 70 Pac. 86.

This question is discussed at length in City Street Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 762. The court shows that this conclusion is strengthened by the amendment to section 3 in 1891; that if it had been the intention merely to suspend proceedings, the legislature would have used direct language to that effect; and that the provision for terminating the veto by petition is to be read in connection with section 4, which requires a resolution after the petition.

11 Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262. The statute makes no express provision for a hearing to determine whether or not a protest is legally signed. But see dictum in Thomason v. Carroll, supra.

12 Pacific Paving Co. v. Mowbray, 127 Cal. 1, 59 Pac. 205.

determination, subsequent proceedings are void.[13] To the general proposition that a majority protest is a bar, the statute makes several exceptions, which we shall now consider separately.

§ 106. Same—Exception—(1) Where Work is not for One Block or More.—The majority protest is not a bar unless the work "is for one block or more." If the work is for one block it may be barred; otherwise not.[14] For this reason, it has been held that a protest is of no avail as to work on a crossing alone.[15] A block is declared in section 34 to mean a block bounded by main streets. It is clear that under this definition work on a crossing is not for a block. Where work for less than a block comes within the class of sewers, manholes, etc., which are expressly excepted by the statute, it is necessary that a hearing be had on the protest before the work can proceed.[16]

§ 107. Same—Exception—(2) Sewers, Manholes, Culverts, etc.—The statute provides that "when the work or improvement proposed to be done is the construction of

[13] Pacific Paving Co. v. Geary, 136 Cal. 373, 68 Pac. 1028. The determination must affirmatively appear: Pacific Pav. Co. v. Gallett, 137 Cal. 174, 69 Pac. 985.

In Dougherty v. Harrison, 54 Cal. 428, a case under an earlier statute, the court said: "In our opinion, this bar must be held to exist, unless it should appear by some evidence that the bar had been removed, either by a petition of the property owners or by the existence of a state of things expressed in the proviso. The protest or written objections of the property owners introduced in evidence displaced the prima facie proof of regularity made by the warrant, assessment, and diagram introduced by plaintiff, and threw upon him [the plaintiff] the burden of showing that the bar effected by the objections on file had been removed."

[14] See Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262.

[15] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916. The protest is also of no avail because there is no property fronting on a crossing: See, also, City Street Imp. Co. v. Rontet, 140 Cal. 56, 73 Pac. 729.

[16] Gray v. Burr, 138 Cal. 109, 70 Pac. 1068.

sewers, manholes, culverts, or cesspools, cross-walks, or sidewalks, curbs and gutters, and the objection thereto is signed by the owners of a majority of the frontage liable to be assessed for the expense of said work, as aforesaid, the said city council shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector, or his agent, when he appears for such objector. At the time specified said city council shall hear the objection urged, and pass upon the same, and its decisions shall be final and conclusive, and the said bar for six months to any further proceedings shall not be applicable thereto." It is to be noted that this is the only hearing expressly provided for when a majority protest is filed in excepted cases. It does not require a hearing in cases of paving, for paving is not within the exception.[17] While the filing of objections of a majority does not, in the cases above mentioned, have the effect of an absolute veto upon the council's jurisdiction to order the work, it suspends the exercise of that jurisdiction until the objections of the protestants are passed upon.[18] A resolution ordering the work, passed before hearing, is void.

§ 108. **Same—Exception—(3) Where Work on Both Sides of Two Blocks Done, etc.**—An exception is made where "not more than two blocks, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon said street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved." In such cases the bar of six months does not apply. From the wording "otherwise unimproved," it would seem doubtful if this

[17] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.
[18] Gray v. Burr, 138 Cal. 109, 70 Pac. 1068.

exception applies to a block which has been previously improved.[19] And it is questionable if it applies to a case where the improvement previously made on each side of the block proposed to be improved is not substantially similar in character to the work proposed to be done upon the block to be improved.[20] It has been held that it does not apply where a new improvement, of a character different from that which has been done on part of the street but not within two blocks of the end thereof or of a similar improvement, is extended one block farther, covering an inferior improvement.[21] It is not necessary to provide for all of the work between the two parts already done. The resolution may provide for doing only a part of the work.[22] While the protest does not of itself bar the work, "if the objection be allowed by the board, its effect will be the same as in other cases,—that is, it will have the effect not only to stay the work, but to devest the board of jurisdiction to proceed further without a new resolution of intention."[23]

19 City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

20 City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

21 "If it could be held to apply to such a case, the provisions for a protest could be entirely evaded, by first improving one block at one end of a street, and then improving each succeeding block by a series of proceedings covering but one block. This would be a perversion of the spirit and purpose of the exception, the object of which is to prevent the owners of property fronting on any two consecutive blocks of a longer street, which has been improved on each side of them, or up to them, in case they are at the end of a street, from obstructing the completion of the improvement of that portion of the street, as a whole, by the filing of objections to a similar improvement of the part of the street fronting their property": City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

22 Section 2 confers general authority "to order the whole or any portion" improved. This is limited by the provision in section 3 for a protest barring the work. The exception removes the limitation. Hence the general authority permits the council to order a part of the intervening blocks to be improved: Smith v. Hazard, 110 Cal. 145, 42 Pac. 465.

23 Pacific Paving Co. v. Sullivan Estate Co., 137 Cal. 261, 70 Pac. 86.

§ 109. Same—Exception—(4) Where One-half Done.—The fourth exception is stated as follows: "And if one-half or more in width or in length, or as to grading, one-half or more of the grading work of any street lying and being between two main street crossings, or if a crossing has been already partially graded or improved as aforesaid, said council may order the remainder improved, graded, or otherwise, notwithstanding such objections of property owners." This adds little, if anything, to the first exception.

§ 110. Same—Exception—(5) Work Done Under District Plan.—While the express wording of the statute does not except work done under the district plan from being barred by a protest signed by the owners of a majority of the frontage, and while the question has not been squarely decided by the higher courts, it is quite generally conceded that such work cannot be barred. The procedure is so different in cases of district assessment that it would seem clear that the legislature did not intend to make the provision for a majority protest apply. The property fronting on the improvement may be a very small part of that assessed; in fact, it may not be assessed at all. The purpose of allowing a majority of the frontage to bar the work is to protect the interests of those who are to bear the heaviest burdens. Under the wording of the statute, only owners of land fronting upon the street are entitled to make such a protest, while the burden may be distributed more heavily upon others. To deny property owners off the line of the improvement, parties who generally derive the smallest part of the benefit, a right granted to owners on the line of the improvement, would be so manifestly unfair that the courts could hardly so construe the statute. Moreover, it may be argued that the provision for the district plan follows a complete statement of the preliminary proceedings for a front-foot assessment, and is therefore to be considered an alternative procedure, to which only such portions of the first part apply

as are referred to or are included by inference. Furthermore, a separate protest is authorized and the proceedings thereon are prescribed. This would seem to be the only remedy the legislature intended to provide.

§ 111. Majority Protest as to Part of the Work.—Where a resolution of intention provides for several classes of work, the owners of a majority of the frontage may bar a portion of the work without interfering with the remainder. "The city council cannot, by including certain work which the property owners object to with work which they desire, compel them to accept the objectionable portion, or be deprived of that which they wish to have done. The resolution of intention is only a proposition by the council, and frequently consists of distinct classes of improvements upon designated portions of the same street, or of different streets; and in such case it is competent for the council to order only one or more of these classes to be done. In either case the owner may protest against any portion of the work included in the resolution, without including in his protest all of the work embraced therein, and it is immaterial whether the different classes of work upon the same street are included in one paragraph or in different paragraphs. The right of the owner to protest is the same in each instance."[24] It would seem to follow that where the council provides for work on several streets in one resolution, a protest may bar work on one street without affecting work on another.[25] It should be noted, however, that the part which may be barred must be a distinct and separable part of the work. The council cannot order a street paved for part of the distance mentioned in the resolution of intention.[1] Hence the protest of a majority of the property owners on any portion of the

[24] Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535. See, also, Gray v. Burr, 138 Cal. 109, 70 Pac. 1068.

[25] See, ante, sec. 68. The exact point has not been decided; but the inference from the cases cited in the preceding note is clear.

[1] See post, secs. 131, 132.

street is of no avail unless they constitute a majority of the whole frontage.

§ 112. Petition of Remonstrance.—The provision as to the petition of remonstrance is as follows: "At any time before the issuance of the assessment-roll, all owners of lots or lands liable to assessment therein, who, after the first publication of said resolution of intention, may feel aggrieved, or who may have objections to any of the subsequent proceedings of said council in relation to the performance of the work mentioned in said notice of intention, shall file with the clerk a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object; such petition or remonstrance shall be passed upon by the said city council, and its decision therein shall be final and conclusive." It has been said that this provision refers to subsequent proceedings of the council in relation to the performance of the work;[2] but this is a mere dictum and does not seem warranted by the language of the statute. The punctuation clearly indicates that the words "subsequent proceedings" do not relate to persons "who may feel aggrieved," but only to persons "who may have objections." It would seem from the wording that the legislative intention was to permit any owner to file a petition of remonstrance, stating any reason why the work should not be done. The petition must state "in what respect they feel aggrieved, or the proceedings to which they object." Hence a petition purporting to be a majority protest, which does not comply with this requirement, need not be considered as a petition of remonstrance.[3] It has been held, under an old statute containing a similar provision, that parties who do not file the petition cannot object that proper action was not taken on a petition of this sort filed by others.[4] The distinc-

[2] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

[3] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

[4] Harney v. Heller, 47 Cal. 15. The court said: "The defendants to this action did not feel aggrieved, and did not file any remon-

tion between a remonstrance and an appeal under section 11 should be noted. "The former is made to the acts or proceedings of the council, and is made before the assessment; the latter is made after the assessment, and relates to the acts of the superintendent of streets in accepting work not done as required by the contract, or other acts of his specified in the statute."[5]

§ 113. **Objections to the Extent of the District.**—The third protest authorized by section 3 is to the extent of the district. "Objections to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may be made by interested parties, in writing, within ten days after the expiration of the time of the publication of the notice of the passage of the resolution of intention. The city clerk shall lay said objections before the city council, which shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector. At the time specified the city council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If the objections are sustained, all proceedings shall be stopped; but proceedings may be immediately again commenced by giving the notice of intention to do the said work or make said improvements. If the objections are overruled by the city council, the proceedings shall continue the same as if such objections had not been made."

strance against the proposed work. Conceding that the right to object to any proposed work is the day in court of the property holder, still the defendants had their day in court, and it is a matter of no concern to them whether certain other property owners, who do not complain, had theirs or not."

[5] Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.

§ 114. **Effects of Failure to Protest.**—It is competent for the legislature to prescribe that a failure to object shall be a waiver of defects not jurisdictional in their nature.[6] And it is accordingly held that a failure to make the protests authorized by section 3 is a waiver of all prior technical defects and informalities. As we have already seen, unless the protest is filed in time the right to protest ceases.[7] A failure to file a petition of remonstrance is a waiver of all technical defects and informalities which have occurred prior to the expiration of the period within which it may be filed.[8] It is not, however, a waiver of jurisdictional defects. By jurisdictional defects is meant those which go directly to the right of the board to order the work or make the assessment. We have already seen what some of these are, and more will be stated later. A failure to file objections to the extent of the district is a waiver of all right to object thereto.[9]

§ 115. **Proceedings Under Section 4.**—Section 4 provides: "The owners of a majority in frontage of lots and lands fronting on any street, avenue, lane, alley, place, or court, or of lots or lands liable to be assessed for the expense of the work petitioned to be done, or their duly authorized agents, may petition the city council to order any of the work mentioned in this act to be done, and the city council may order the work mentioned in said petition to be done, after notice of its intention so to do has been posted and published as provided in section 3 of this act." The meaning of this section is far from clear; and it would seem to be effective only in cases where a majority protest may stop the work for six

[6] Lent v. Tillson, 72 Cal. 404, 14 Pac. 71.

[7] Warren v. Russell, 129 Cal. 381, 62 Pac. 75.

[8] See Spaulding v. North San Francisco H. & R. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249, as to a somewhat similar provision in an earlier statute. See, also, Chambers v. Satterlee, 40 Cal. 497, and Dyer v. Parrott, 60 Cal. 551, where the rule was laid down in relation to appeals from assessments.

[9] Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

months. In this respect, it must be read in connection with the provision of section 3 permitting new proceedings to be instituted within six months after the filing of a majority protest upon the filing of a majority petition. The express language of this section does not limit it to this, however. The petition may be signed by owners "of lots or lands liable to be assessed." This would seem to make it equally applicable to proceedings under the district plan. The advantage of this in proceedings under the district plan is not clear. It is to be noted that the council is not bound to institute proceedings upon filing of a petition. It is optional with that body.

§ 116. Same—Contents of Petition—Who may Sign.—While the statute does not specify the requirements of the petition, it would seem that it must sufficiently describe the work to enable the council to determine exactly what is intended. No particular form is required. It may be signed by the owners of the property, or their duly authorized agents. The word "owner" includes his executor, administrator or guardian.[10] The rules applicable to the signatures to protests do not apply to a petition to have the work done. Thus, one cotenant may protect the entire estate, but he cannot burden it. Hence, while he may sign a protest,[11] he cannot sign a petition for the entire frontage.[12] Upon the same principle, an officer of a corporation cannot, without special authority, sign a petition on behalf of the corporation.[13]

§ 117. Same—Resolution of Intention.—This section does not dispense with the requirement of a resolution of inten-

10 See section 16 of the act. See, also, Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

11 Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

12 Mulligan v. Smith, 59 Cal. 206.

13 Mulligan v. Smith, 59 Cal. 206; Kahn v. Board of Supervisors, 79 Cal. 388, 21 Pac. 849.

tion.[14] The section requires notice of intention to be posted; and the intention of the council can be expressed only by resolution or ordinance. If the benefits of section 4 are to be claimed, the resolution of intention should describe the same work that is described in the petition; for it is such work only that this section authorizes. It may contain a finding as to the petition; but this would not seem to be jurisdictional. The section does not contemplate that the owners may limit the powers of the council by filing a petition. The right of the council to order the work resting within its discretion, it may disregard the petition and pass a resolution of intention describing other and different work. Thus, although a majority petition may ask the macadamizing of a street, the council may initiate proceedings to pave it with asphalt. Of course, in such a case, any benefits given by this section cannot be claimed.

§ 118. **Same—Notice.**—Jurisdiction is acquired only "after notice of its intention so to do has been posted and published as provided in section 3 of this act." The question arises whether this requires all the posting and publication required by section 3, or merely the posting and publication of the resolution of intention. The question turns upon the meaning of the words "notice of its intention." It has been argued that earlier statutes provided for posting "in the form of a resolution," and that this provision should be construed as requiring no more.[15] In my opinion,

14 City Street Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 762 (dictum).

15 See Finlayson, Street Laws, pp. 41, 42, where it is said: "The words 'notice of its [the council's] intention so to do' have in all the acts, when used, meant 'notice of its intention so to do, in the form of a resolution, describing the work, and published and posted for a certain time.' Thus the act of 1862, amending San Francisco's Consolidation Act, provided that 'the board of supervisors may order any work . . . . to be done, after notice of their intention so to do, in the form of a resolution, describing the work, ... has been published for a period of ten days.' So that it would seem from

the words are not open to that construction. Both the resolution and the notice of the street superintendent give notice of the intention of the council. Their purpose is to advise owners of that intention, in order that they may act. Hence, the requirement means that all publications and postings required by section 3 are to be made. If the legislature had intended to limit the publication and posting, it would have used the words which it used in the earlier statutes. There is no reason why the notices need contain any statements other than those required in ordinary proceedings.

§ 119. **Same—Protests.**—A more difficult question arises as to the application of the provisions in section 3 as to protests. It would seem that the purpose of section 4 is to make inoperative the provision as to a majority protest. Otherwise, it would have little effect; for if some of the signers could, by changing their minds, stop the work, there would be little advantage in the petition. Hence, in my opinion, the provision for a majority protest does not apply. The provisions for a petition of remonstrance and for objections to the extent of the district are upon a different footing. They do not stop the work, but merely give a hearing. Section 4 requires notice of intention. If no protest whatsoever can be made, notice is an idle act. The law does not provide for such notices. It has been argued that notice is required to overcome constitutional obstacles; but no constitution requires the absurdity of a notice without a right in the party

the meaning heretofore placed upon the phrase, 'notice of its intention,' as well as the context in which it appears in section 4 of the act, that the true meaning of this section (section 4) is that 'the council may order the work mentioned in said petition to be done, after notice of its intention so to do (in the form of a resolution) has been posted and published as provided in section 3 of this act." It seems to me that the fact that the council is directed to give notice of its intention in one manner by one act is not an argument to show that the legislature intended to have it given in the same way under another act; especially where it has provided another method of giving notice of intention in a preceding section.

notified.[16] Section 4, then, providing for notice, must be reasonably construed as giving those affected some right to protest. No other protests prior to the order authorizing the work being provided for, reason would seem to require the construction of section 4 to be that the owners may file a petition of remonstrance or objection to the extent of the district.

§ 120. Plans, Specifications, and Estimates—In General. Section 3 provides: "Before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him." This provision does not limit the right of the council to require specifications before the commencement of proceedings. As we have already seen, plans and specifications may be made an integral part of the resolution of intention, or may be referred to therein for purposes of description.[17] It is not necessary, however, to adopt specifications before the passage of the resolution of intention;[18] nor, except for sewer work, need they be adopted before the passage of the resolution ordering the work.[19] Section 5, however, provides for specifications before the posting of notice calling for bids.[20] Estimates need not be furnished at all unless required by the council.[21] Prior to 1911, they were required when bonds were to be issued.

16 See ante, secs. 6–14.

17 See ante, sec. 77.

18 See ante, sec. 77.

19 Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683. See, also, Fay v. Reed, 128 Cal. 357, 60 Pac. 927.

20 See Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683.

21 Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Sacramento Pav. Co. v. Anderson, 1 Cal. App. 672, 82 Pac. 1069; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53.

§ 121. **Purpose and Effect of Specifications.**—The purpose of specifications is to determine the details of construction. The duty of preparing them devolves upon the city engineer, the function of the council being merely that of supervision. When prepared, the specifications should conform to and be consistent with the description in the resolution of intention.[22] And they should be accompanied by an estimate of the cost.[23] When specifications are made a part of the resolution of intention, a defect in description or requirement may deprive the council of jurisdiction to order the work done.[24] But where the specifications are not referred to and are not approved by the council, defects are not to be regarded as defaults of the council, and do not interfere with the jurisdiction to order the work.[25] And this would seem to be the same although the specifications have been approved, where the resolutions are complete in themselves. Where such specifications, however, contain an invalid provision, they may, when attached to the contract, make it and the assessment void.[1] A trifling variance between the specifications and the resolution of intention is immaterial.[2]

§ 122. **Specifications may be Adopted by Resolution.**—Specifications for a particular work may be adopted by a resolution of the council, without the formalities necessary

22 Fay v. Reed, 128 Cal. 357, 60 Pac. 927.

23 Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078. And this necessarily requires an examination of the character of the ground: Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881.

24 See ante, sec. 77. See, also, Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612.

25 Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078.

1 See cases cited in following sections.

2 See McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924. In this case, the resolution called for a lamphole to be placed at the point indicated on plans and specifications. The specifications called for six lampholes. The variance was held immaterial.

for the adoption of an ordinance.[3] This does not conflict with the provision in section 6 that "the city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work." This provision is not mandatory.[4] The council may, if it see fit, adopt such an ordinance, to govern all future work; but its failure so to do does not impair the validity of the proceedings. Evidence that plans and specifications were prepared by the city engineer, were on file, and were approved by the council is sufficient to prove their authenticity, without any showing of an order of the council requiring their preparation.[5] Under an old statute, a resolution calling for bids for work in accordance with plans and specifications on file was held equivalent to an adoption of the specifications.[6]

§ 123. Specifications Need not Include All Details.—We have already seen that the council cannot delegate to any

[3] Santa Cruz Rock Paving Co. v. Heaton, 105 Cal. 162, 38 Pac. 693; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 54. For the distinction between an ordinance and a resolution, and the use of resolutions, see ante, sec. 65.

[4] Santa Cruz Rock Paving Co. v. Heaton, 105 Cal. 162, 38 Pac. 693. In this case the court said: "There is nothing in section 6 or in the whole act of March 18, 1885, indicating that the legislature intended to command the city councils to prescribe general rules as to what kinds of materials should be used, or as to mode of executing work, or that anything more was intended by the above extract from section 6 than the ordinary import of the language of that extract, namely: That city councils are permitted, in the exercise of their discretion, to prescribe such general rules as they deem practicable. It is improbable that the legislature deemed it practicable for city councils to prescribe such general rules as would be properly adapted to all the different kinds of street improvements, though it may have been deemed practicable to frame general rules applicable to some kinds of work. But, surely, there is nothing in the act indicating an intention to make the adoption of such general rules a condition precedent to jurisdiction of councils to order work to be done."

[5] Gill v. Dunham (Cal.), 34 Pac. 68.

[6] City of Stockton v. Skinner, 53 Cal. 85.

official the duty of determining the character of the work, except in cases where the character cannot, from the nature of the case, be predetermined.[7] It is not necessary, however, that the specifications cover all the possible details of construction. "The purpose of specifications is, indeed, to determine and prescribe the details of construction, but this can be effected only approximately. To some extent such details must depend on unanticipated contingencies, and can be determined only by the exigencies of the actual construction. The specifications must, therefore, always fail, more or less, in certainty or completeness of detail, and, hence, the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work as to kind and amount of work or materials and other details of construction. The question as to the sufficiency or insufficiency of specifications is, therefore, one merely of degree—that is, not whether they are certain or uncertain, but whether they are more uncertain than is desirable. To this question no general answer can be given; and hence, in the absence of specific provisions of the law, it must be regarded as immaterial to the validity of the assessment."[8]

§ 124. **Specifications must not Increase Burden on Property Owner—Bond to Repair.**—No provision which may increase the cost of the work and which is not authorized by the statute may be included in the specifications. The statutory burden is the limit beyond which the legislative body of the city cannot go. Accordingly, specifications and the assessment are void when there is a requirement for a bond, conditioned "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract."[9] Such a provision would naturally tend to in-

7 See ante, secs. 82–85, and cases there cited.

8 Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078. See, also, Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94.

9 Brown v. Jenks, 98 Cal. 10, 32 Pac. 701. In this case, which is the leading case in California on this point, the court said: "The

crease the cost and to add a burden not contemplated by the statute. Likewise, specifications are void which require that bidders shall "file a bond in the sum to be determined by the mayor guaranteeing the work for one year from injury by ordinary use."[10] Such requirements, even if construed as merely demanding security that the work shall be well done, are equally void.[11] The lot owner cannot be made to pay for such a guaranty, which may become worthless before the time has elapsed. Besides, "officers are provided and vested with the power and charged with the duty of seeing that

bond is not only unauthorized by the words of the statute, but the requirement changes and may increase the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required. And then they are assessed upon a different basis from that provided by the statute. Section 13 provides that needed repairs shall be made by the owners of the frontage where the repairs are required. Under the contract, all the owners of frontage along the entire line are assessed in proportion to frontage. As to some of them no repairs may ever be required, or such as would be much less costly than repairs at other places along the line covered by the contract."

[10] Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 80 Am. St. Rep. 124, 62 Pac. 394, 52 L. R. A. 264. In this case the court said: "It is said that the provision here only guarantees the work, and does not require the contractor to keep the streets in repair, as was the case in Brown v. Jenks, supra. But we are unable to draw any such nice shades of distinction. . . . . It is a self-evident proposition that the use of a paved or macadamized street by the traveling public for one year will injure it to some extent, at least. . . . . Neither does the time make any difference. If a contract to keep in repair for five years is a burden upon the taxpayers, so is a contract to keep in repair for one year. Such contract is a burden in either case, although differing in degree."

[11] Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 80 Am. St. Rep. 124, 62 Pac. 394, 52 L. R. A. 264.

such work is properly done. A bond cannot be substituted for the performance of this duty."[12] The fact that the contractor is willing to testify that the requirement did not increase his bid is immaterial, for others might have bid a less sum if the requirement had not been made;[13] nor would the testimony of all the bidders that their bids were not increased by the requirement be material.[14]

§ 125. Same—Provision as to Damage.—This doctrine has been extended by a series of cases, the reasoning of which has been discredited, but which are still law. The leading case is Blochman v. Spreckels,[15] in which a provision that "all loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor" was held to make the specifications and assessment void. The court held that this did not relate alone to damage during the progress of the work, "but had a broader meaning and looked to damage which might arise out of and subsequent to the completed work." This case was decided in Department No. 1 of the Supreme Court, and was immediately followed by the decision of Department No. 2 in Goldtree v. Spreckels,[16] so that the proposition was practically decided by a full court. Under the circumstances, it has been held that a rule of property has been established, which must be followed in similar cases.[17] Ac-

12 Id. See, also, Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213.

13 Brown v. Jenks, 98 Cal. 10, 32 Pac. 701.

14 Stansbury v. Poindexter, 154 Cal. 709, 129 Am. St. Rep. 190, 99 Pac. 182.

15 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213.

16 135 Cal. 666, 67 Pac. 1091. These cases were followed in Hatch v. Nevills (Cal.), 95 Pac. 43 (not officially reported).

17 Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Joyce v. Newmark, 7 Cal. App. 176, 93 Pac. 1041.

In the case first cited the court said, referring to Blochman v. Spreckels: "The construction given by these decisions to the provision in question was certainly a permissible one. Under these

cordingly, it has been held that a provision in a Los Angeles ordinance that "all loss or damage arising from the nature of the work to be done under this agreement . . . . shall be sustained by the contractor" is void.[18] A specification requiring the contractor to bear loss resulting from his carelessness in doing the work does not come within the rule. Thus, the following specification has been upheld: "All loss or damage arising from the nature of the work to be done under these specifications, during the progress of the work and before the acceptance thereof, or from any act or omission on the part of the contractor, or any agent or person employed by him, occurring in the course of the work not authorized by these specifications, shall be sustained and borne by the contractor."[19] Such damage must be borne by him as a matter of general contractor's liability; so it is clearly immaterial whether the specifications so state or not. In the case cited, the rule of Blochman v. Spreckels is said to be harsh, and not to be extended.

§ 126. **Same—Limitation of Hours of Labor.**—In the absence of charter provision, it would seem clear that the

circumstances, we would not feel warranted in overruling such decisions, even if we felt that a different construction might have been given to that provision."

[18] Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Van Loenen v. Gillespie, 152 Cal. 222, 96 Pac. 87; Stansbury v. Poindexter, 154 Cal. 709, 129 Am. St. Rep. 190, 99 Pac. 182; Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367; Glassell v. O'Dea, 7 Cal. App. 472, 95 Pac. 44; Joyce v. Newmark, 7 Cal. App. 176, 93 Pac. 1041; Charters v. Stansbury, 10 Cal. App. 192, 101 Pac. 418; True v. Fox, 155 Cal. 534, 102 Pac. 263. And it is immaterial that the provision is not strictly a specification: Van Loenen v. Gillespie, supra.

[19] Gay v. Engebretsen, 158 Cal. 21, 109 Pac. 876. See, also, Schindler v. Young, 13 Cal. App. 18, where the following specification was upheld: "The contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury."

specifications cannot limit the hours of labor which the contractor may require of his employees. Such a provision would clearly tend to increase the cost; and being unauthorized, is void.[20] The Penal Code limits the hours of work on all public work to eight hours a day, provides a penalty for breach, and authorizes the "representative of the state or political subdivision" to deduct the amount of penalties from the amounts becoming due under the contract.[21] The constitutionality of this statute has not been directly passed upon in California; but similar statutes have been upheld by the Supreme Court of the United States.[22] Whether valid or not, it does not apply to contracts under the Vrooman Act. Except in rare cases, no part of the cost of work done under this act is paid out of the public treasury. "Where a duty is prescribed by a statute and a remedy is therein provided for a breach of such duty, and the remedy is such that it cannot be applied to a particular subject, it is but fair to infer that such subject was not within the view of the legislature when it enacted the statute. In the present case, the legislature, having in the act itself not only fixed the penalty, but provided the manner for enforcing the same in case of a violation of the stipulation, must be presumed to have intended the act to apply to those cases only wherein the penalty could be enforced in the manner designated, namely: by a retention of the forfeitures out of the amount due to the contractor from the political subdivision, party to

20 This is the inference to be drawn from Flinn v. Peters, 3 Cal. App. 235, 84 Pac. 995.

21 Pen. Code, sec. 653c.

22 In Ex parte Kuback, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737, 9 L. R. A. 482, an ordinance similar to this was held unconstitutional so far as it attempted to create a criminal liability. In Worthington v. Breed, 142 Cal. 102, 75 Pac. 675, the Supreme Court refused to pass upon the constitutionality of this section, basing its decision upon other points. The United States Supreme Court, however, in Atkin v. State, 191 U. S. 207, 24 Sup. Ct. Rep. 124, 48 L. ed. 148, upheld a similar statute. In general, as to the validity of statutes limiting the hours of labor, see 62 Am. St. Rep. 181, note.

the contract. It is clear that such remedy is wholly inapplicable to the case at bar."[23] Inasmuch as city charters adopted since 1896 control in municipal affairs, it would seem that a charter provision expressly requiring such stipulation would govern. But it would seem doubtful if a charter provision requiring it in all contracts to be performed for the city applies.[24] The effect of such a stipulation in the contract is discussed later.[25]

§ 127. **Same—Limitation to Union Labor.**—It would seem clear that the specifications must not limit the contractor to the employment of union labor. Such a restriction would clearly tend to increase the cost; and it is open to the further objection that it tends to monopoly and is therefore against public policy. "If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision. There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be obtained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and

[23] Genilla v. Hanley, 6 Cal. App. 614, 92 Pac. 752. The same reason would make the provisions of Stats. 1903, p. 119, inapplicable.

[24] The court refused to decide whether the work is done "for" the city in Flinn v. Peters, 3 Cal. App. 235, 84 Pac. 995. See, also, Genilla v. Hanley, 6 Cal. App. 614, 92 Pac. 752.

[25] See post, sec. 165.

requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work."[1]

§ 128. **Right to Specify Patented Materials.**—It was held in an early case that the council cannot specify a patented material which can be used by only one contractor. The statute requires contracts to be let only after advertisement for bids. "To advertise for sealed proposals where there can be but one bidder, to open them in open session, to examine and publicly declare them, and thereupon award the work to the lowest responsible bidder, where there is and can be but one, to notify the owners of the frontage, if they so elect, to come forward and perform work which by the paramount law of the land they are prohibited from performing under heavy responsibilities, would be to play as broad a farce as was ever enacted behind the footlights. The law does not permit itself to be thus trifled with, nor allow its ministers to thus substitute pretense for performance."[2] It

[1] Adams v. Brenan, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314, 42 L. R. A. 718. See, also, City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335.

While this proposition has not been decided by the California courts, there would seem to be no question as to its correctness.

[2] Nicolson Pavement Co. v. Painter, 35 Cal. 699. See, also, Nicolson Pavement Co. v. Fay, 35 Cal. 695; Dunne v. Altschul, 57 Cal. 472. In the case last cited it is said that the fact that a patented material, not specified, is actually used, does not impair the validity of the assessment. In Mulrein v. Kalloch, 61 Cal. 522 (not a street law case), the following specification was held unobjectionable: "The lathing used must be either Carter's patent lathing of the same construction as that previously used on the building, and which must be cut out and manufactured from the sheet iron within the limits of the city and county of San Francisco, or it must be some other description of lathing, also to be cut out and manufactured from the sheet iron within the limits of the city and county of San Francisco, of equal quality and merit to the lathing above specified, and to be approved as such by the commissioners and the architect and the superintendent." The court held that the commissioners had determined what was best adapted to the purpose, and that it would not substitute its judgment for that of the commissioners.

is clear that this rule limits the city in its improvements, and in some cases may prevent the use of a most desirable material or process. For this reason subsequent cases have confined the doctrine within narrow limits; and from statements of the courts in later cases, there is some question as to whether the early cases would now be followed even within the limits.[3] In a later case the specifications required paving with bituminous rock prepared for use "by either steaming, hot air, or other process." It was contended that all the known processes for melting the rock were patented except one, which the street superintendent would not allow. It was shown, however, that any contractor might use the patented processes by paying a royalty. The court held the specifications legal, saying: "Appellant's contention would effectually exclude all methods of paving which were patented, even though such method, because of its superiority, or even because of its cheapness, would be specially advantageous to the owners of lots liable for the expense of paving, as well as the municipality charged with its main-

[3] N. P. Perine Contracting & Pav. Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533. In this case the court intimates that the early cases depended upon special facts.

There is a conflict of authority as to the right to use patented materials in other states. An excellent discussion of the subject will be found in Holmes v. Common Council, 120 Mich. 226, 77 Am. St. Rep. 587, 79 N. W. 200, 45 L. R. A. 121, where the right was sustained. The court said: "In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innovations involve patents; others are introduced through agencies, as in this case, and they are therefore practically controlled by one person or firm. Again, some kinds of stone come from a single quarry; limes and cements differ in quality, and some may not be safely used; and in many instances the superiority of a given article is generally recognized. . . . . We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer."

tenance."[4] For certain parts of the work the statute expressly authorizes the use of patented materials; but this does not necessarily overthrow the earlier cases. Thus, the sixth subdivision of section 34 provides: "The words 'paved' or 'repaved,' as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance adopt." This is not broad enough to include all work nor all processes; nor is it impossible to construe it as allowing the use of patented materials when competitive bidding is possible.

§ 129. **Resolution Ordering Work—When Jurisdiction Acquired.**—Section 3 provides: "At the expiration of twenty days after the expiration of the time of said publication by said street superintendent, and at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention, if no written objection to the work therein described has been delivered, as aforesaid, by the owners of a major frontage of the property fronting on said proposed work or improvement, or if any written objection purporting to be signed by the owners of a major frontage is disallowed by said council, as not of itself barring said work for six months, because in its judgment, said objection has not been legally signed by the owners of a majority of said frontage, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act." It is to be noted that the resolution is to be passed "at the expiration of" certain periods. The clear meaning of this is that the full period must elapse before any resolution will be proper. It follows that the earliest date upon which the resolution may be passed is twenty-one days after the full

[4] N. P. Perine Contracting & Pav. Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

period of publication by the street superintendent and twenty-six days after the full period of posting and publication of the resolution of intention.[5] A resolution adopted prior to the time authorized is void as being in excess of jurisdiction.[6] A resolution is adopted when it is passed by the city council. Where it is adopted in the form of an ordinance prematurely, but is not signed by the mayor until the expiration of the periods, it is void.[7] There is no limitation as to a time before which the resolution must be adopted. Thus, a resolution ordering work passed almost nine months after the adoption of a resolution of intention has been held valid.[8]

§ 130. **Same—Form.**—A resolution ordering the work may be adopted either in the form of a resolution or in the form of an ordinance. In this respect the same rules which govern the resolution of intention apply. Under ordinary circumstances, it is not necessary that the resolution be ap-

[5] While this is not the holding in Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367, it is upon this alone that the case can be supported. The statement of facts is as follows: The street superintendent published notice on April 9, 1903, the last publication being April 15, 1903. One of the intervening days was Sunday. The resolution ordering the work was adopted May 4th. The court stated that this was only nineteen days after publication and the resolution was therefore premature. As a matter of law, the publication was complete on April 14th. Publication for six days does not necessarily mean six publications. Publication for as many times during the period as the paper regularly appears is sufficient: California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. Hence, the resolution was passed on the twentieth day; and if that were sufficient, jurisdiction was acquired, but otherwise not.

[6] Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367. See, also, Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546 (when jurisdiction acquired, under old provision). But see Burnett v. Mayor etc. of Sacramento, 12 Cal. 76, 73 Am. Dec. 518.

[7] Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367.

[8] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

proved by the mayor.[9] In an early case it was said that this resolution is in the nature of a judgment.[10] Section 55 provides: "In all resolutions, notices, orders and determinations subsequent to the resolution of intention and notice of street work a description of the work or the assessment district by reference to the resolution of intention therefor shall be sufficient."

§ 131. Same—Resolution of Intention is Measure of Jurisdiction.—The resolution of intention is the measure of the jurisdiction of the council to order the work. Obviously, the council cannot order more work than the resolution of intention describes.[11] The property owners are entitled to know of the proposed improvement before it is ordered. Hence an assessment for more work than the resolution of intention calls for is void, although an assessment for only the work authorized may be upheld.[12] A more difficult question is the right to order less than the resolution of intention describes. Owing to the condition of the authorities on this point, it is necessary to make careful distinctions.

9 As to the general proposition, see ante, sec. 65. See, also, Mulberry v. O'Dea, 4 Cal. App. 385, 88 Pac. 367; City of Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890.

That the resolution need not be approved by the mayor, see McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909.

10 Dougherty v. Foley, 32 Cal. 402.

11 Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1018; Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493. See, also, Dyer v. Chase, 52 Cal. 440; Donnelly v. Howard, 60 Cal. 291; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Himmelmann v. Satterlee, 50 Cal. 68; Beaudry v. Valdez, 32 Cal. 269; Dougherty v. Hitchcock, 35 Cal. 512.

Thus, a resolution of intention to macadamize a street does not authorize rock gutterways: Partridge v. Lucas, supra. In Gill v. Dunham (Cal.), 34 Pac. 68, it was held that the resolution ordering the work must substantially follow the resolution of intention. The fact that a slight amount of grading must be done does not make a resolution for paving void. The grading is merely incidental: Williams v. Bisagno (Cal.), 34 Pac. 640.

12 See cases cited in preceding note. As to the validity of a severable assessment under such circumstances, see post, sec. 206.

Where but one class of work is called for along one street, the council cannot order less than the resolution calls for.[13] The argument is that the owners might object to doing part only, when they would favor improving the whole street; and further, that such a procedure might increase the burdens because the proportion of incidental expenses would be greater upon those assessed and because a contractor might put in a higher bid for a small improvement than for a large. Thus, in one case the resolution of intention called for sidewalks except where already laid. The council then gave a permit, under which part of the work was done under private contract. Then the resolution ordering the work was passed, using the same language as the resolution of intention. The court held that each resolution must be regarded as referring to conditions existing at its date; that the resolution ordering the work provided for less work than the resolution of intention, and was therefore void.[14] Again,

[13] Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214; McBean v. Redick, 96 Cal. 191, 31 Pac. 7. See, also, Dougherty v. Hitchcock, 35 Cal. 512; City of Stockton v. Whitmore, 50 Cal. 554; Warren v. Chandos, 115 Cal. 382, 47 Pac. 132.

[14] Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214. In this case the court said: "Here, it is said, the entire work proposed was done; the only complaint is that some of the work was done by the lot owners themselves, and not by a contractor under the provisions of the law. Still, in this case the entire improvement will be made. This difference removes one of the arguments by which these decisions are supported, but there are other respects in which the property owner may be injured if the contract does not include the entire work proposed. 1. All frontage is bound for expenses, including engineer's estimates, advertising, etc. If a large improvement is ordered, these may amount to a considerable sum. The lot owner might be willing that the work should be done if a hundred lots were bound to contribute equally in this expense, but might in reason object if only his lot were bound. Those who do the work in front of their lots escape the assessment altogether. If the lot owner knew that his lot would be the only one assessed, although the entire improvement would be made, he would be very likely to remonstrate. And 2. It would probably increase the cost of the work to the lot owner if only a small part of the work was finally to be done by contract. There would probably be fewer bidders for a small job, and the cost might be much

the council must not order work other than that mentioned in the resolution of intention. Thus, where the grade was changed after the passage of the resolution of intention, it was held that the council lost jurisdiction.[15]

§ 132. **Same—Same—Where Improvements are Distinct.** A different rule applies when the resolution of intention provides for several distinct classes of work upon the same street or upon several streets. In such a case, the council may order one class done without ordering another.[16] It is said that the council cannot virtually deprive property owners of their right to protest by including objectionable work with unobjectionable. And it is immaterial whether the several portions of the work are described in one paragraph of the resolution or in several.[17] It has been said that where improvements on several streets are included within one resolution, they must be treated separately in the future proceedings.[18] It is upon this theory alone that any part of the rule stated above can be sustained; for otherwise all the objections which apply to ordering part of one class of work would apply equally here.

§ 133. **Publication of Resolution Ordering Work.**—The resolution ordering the work must be published for two

increased to each lot owner. And then, as to the work done under permits, it would take away the lot owner's right to appeal to the board and contend that inferior work had been accepted by the superintendent of streets."

15 Warren v. Chandon, 115 Cal. 382, 47 Pac. 132.

16 Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535; Gray v. Burr, 138 Cal. 109, 70 Pac. 1068.

17 Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

18 See, ante, sec. 68. In the recent case of Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610, interpreting a provision of the Local Improvement Act of 1901, it was pointed out, as a ground for distinction, that work on each street, under the Vrooman Act, is a distinct improvement. The 1911 amendment, providing that work on several streets may be included in one contract, would seem to destroy the only basis for any part of this rule.

days. This, however, need not be done before the subsequent proceedings are commenced. In a recent case, Mr. Justice Sloss said: "It will be observed that, while section 3 expressly makes the publication of the resolution of intention a condition precedent to the jurisdiction of the council to order the work done, the act contains no declaration that the publication of the resolution ordering the work done shall be made before any further steps can be taken. It is merely provided that the resolution shall be published for two days. We see no good reason for holding that the resolution ordering work done is ineffectual for any purpose until the completion of the publication. The ordinary rule is that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary. This court has held that, under a city charter providing that a board of trustees should publish all ordinances for ten days, but containing no provision that an ordinance should not take effect until after its publication, an ordinance regulating liquor licenses took effect on its passage. The principle of this decision is applicable here." [19]

[19] Gay v. Engebretsen, 158 Cal. 21, 109 Pac. 876.

DIVISION 2.

PROCEEDINGS RELATING TO THE CONTRACT.

§ 134. Notices calling for bids.
§ 135. Contents of notices.
§ 136. Right to let separate contracts.
§ 137. Form of bids.
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§ 158. Same—Entire contract must be in writing.
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§ 160. Same—Provision as to superintendence.
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§ 163. Same—Provision for minimum compensation of laborers.
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§ 165. Same—Same—Stipulation limiting hours of work.
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§ 168. Extensions of time—Right to grant before expiration of time fixed.
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§ 170. Same—Same—Exception where council rejects work accepted by superintendent of streets.
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§ 172. Same—Cannot arise by estoppel.
§ 173. Same—Not by injunction at suit of third party.
§ 174. Rights of city when work not completed in time.
§ 175. Effect of charter provision forbidding city officers to be interested in contracts.
§ 176. Effect of agreement for rebate to certain owners.
§ 177. Contract cannot be modified after execution.
§ 178. Void contract cannot be made valid by ratification.
§ 179. City not liable on void contract.
§ 180. Assignment of contract—By original contractor.
§ 181. Same—By property owners.
§ 182. Right to abandon proceedings.
§ 183. Requirements for private contracts.

§ 134. Notices Calling for Bids.—After the ordering of the work, the next steps in the proceedings are the posting and publication of notices calling for bids. Section 5 provides: "Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall cause notice, with specifications, to be posted conspicuously for five days on or near the chamber door of said council, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work inviting said proposal, and referring to the specifications posted or on file, to be published for two days in a daily, semi-weekly, or weekly newspaper published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided." It is to be noted that "the city council shall cause notice" to be given. This implies an order by the council directing notice. This may be included in the resolution ordering the work.[1] The council must also designate the newspaper in which the notice shall be published; and this also may be included in

1 Gay v. Engebretsen, 158 Cal. 21, 109 Pac. 876.

the resolution ordering the work.[2] No particular form is required for these orders or designations. Where the order directs notice, it will be presumed that legal notice as defined by the statute is meant. Thus, under an old statute, an order providing that "the clerk is hereby authorized to advertise for proposals to do the work" was held sufficient.[3] Under the Vrooman Act the foregoing would not be sufficient without a designation of the newspaper. The order need not specify the time within which bids must be presented.[4] The posted notice must be posted for five official days. In an early case, interpreting a former statute, McKinstry, J., said: "The statute requires that the notice inviting sealed proposals should be conspicuously posted in the office of the Superintendent of Public Streets and Highways for five days. We think this requires that the notice should remain posted in that office for five official days. In other words, it must be posted before the commencement of the first day; that is, before 9 o'clock A. M., when by statute the office is to be opened, and remain posted during the whole of the first, second, third, fourth, and until 4 o'clock P. M. of the fifth day, at which hour the statute authorizes the office to be closed."[5] These notices may be given as soon as the resolution ordering the work and the order for notice are adopted. It is not necessary to wait until the resolution ordering the work has been published.[6]

§ 135. **Contents of Notices.**—It is to be noted that the posted and published notices are not the same. The form of neither is prescribed; but the first should describe the work with sufficient certainty to enable a contractor to bid intelli-

[2] Id.

[3] Himmelman v. Byrne, 41 Cal. 500; Meuser v. Risdon, 36 Cal. 239; Shepard v. Colton, 44 Cal. 628.

[4] Belser v. Allman, 134 Cal. 399, 66 Pac. 492. And see cases cited in the following section.

[5] Himmelmann v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Cal. 289.

[6] Gay v. Engebretsen, 158 Cal. 21, 109 Pac. 876.

gently, and should be accompanied by specifications. This implies, of course, that specifications be adopted before posting.[7] The published notice need not include the specifications, but should refer to them. It has been called a notice of the posting of the notice.[8] The statute makes no provision as to the time within which proposals must be filed. As to this, the Supreme Court has said: "So far as our observation has extended, it has always been the custom of the council to direct notice to be given by the clerk, and for that officer to fix the date for the presentation of proposals. If it should be conceded, however, that his act in this respect was without authority, it would not follow that the notice was thereby vitiated. The unauthorized portion of the notice would be disregarded, and the notice which was authorized by the city council be alone considered. Whether a proposal delivered to the clerk after the date limited in the notice could be disregarded by the council, is a question which does not arise in the present case. It is not to be presumed, in the absence of any showing therefor, that the limitation of time in the notice prevented anyone from presenting a proposal, inasmuch as, if such limitation of time was unauthorized, all persons must be assumed to have known this fact."[9] It was held in an early case that a notice stating that bids would not be received after the third day from the first posting was insufficient;[10] but in view of the later decision, the authority of this case is doubtful. A failure to refer to specifications in the published notice makes the notice insufficient.[11] The fact that it refers to

[7] See, ante, sec. 120.

[8] Belser v. Allman, 134 Cal. 399, 66 Pac. 492.

[9] Belser v. Allman, 134 Cal. 399, 66 Pac. 492. See, also, Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301. In the latter case the court said: "No doubt it was competent for the council to prescribe such limit; and, perhaps had such a limit been prescribed, a re-advertisement would have been necessary."

[10] Hewes v. Reis, 40 Cal. 255.

[11] City of Stockton v. Clark, 53 Cal. 82.

work as grading, in the language of the resolution, and then states that the street is to be regraded, is immaterial.[12]

§ 136. **Right to Let Separate Contracts.**—We have already seen that prior to 1911 it was held competent for the council to include work on several widely separated streets in one resolution of intention, in which case the distinct and several character was to be observed after the work was ordered. In such a case separate contracts for each section of the work could be entered into.[13] Each improvement was distinct, and for each a separate assessment was required. The effect of the amendment of 1911 is somewhat uncertain. It is at least questionable whether separate contracts are now allowable. Where, however, the resolution of intention describes work of different kinds on one street, the entire work must be provided for in one contract.[14] The purpose of the description of the work in the resolution of intention is to enable the owners to determine whether the improvement is for their best interest. "In such cases it may well be that the consummation of a part of the improvement only would bring little or no benefit to owners of adjacent property, while, if completed as a whole, it would greatly enhance the value of their property and add to their convenience and comfort. Yet it must often follow that if a given improvement is to be segregated, and separate contracts let, a portion of the work will not be completed."[15]

§ 137. **Form of Bids.**—Proposals or bids should be in such form that their acceptance will, in itself, make a contract. Strictly speaking, the bid is an offer to enter into

12 Brady v. Feisel, 53 Cal. 49.

13 Bates v. Twist, 138 Cal. 52, 70 Pac. 1023.

14 Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081. In this case the work was done under six separate contracts. The assessments were declared void. See, also, Stimson v. Hanley, 151 Cal. 379, 90 Pac. 945; Dougherty v. Hitchcock, 35 Cal. 512.

15 Treanor v. Houghton, 103 Cal. 53, 36 Pac. 108.

a written contract. The acceptance by the council completes a contract to enter into a contract. Hence, a bid which is in such form that it cannot alone be treated as a binding offer cannot be considered. Thus, an unsigned bid is insufficient, because it does not bind the bidder.[16] And such a bid is not made valid by virtue of the fact that the bond accompanying it is signed.[17] In discussing this, the Supreme Court said: "The question is, If the contractors had been awarded the contract, and had then declined to enter into the formal contract, could a recovery have been had upon the bond? Plainly, I think, a recovery could not have been had. There is no consideration for the bond unless there is a bid. They are not one. The law requiring that the bid shall be accompanied by a bond recognizes their separate existence, and surely if there was not even the semblance of a bid the bond was without consideration, and its recital will not estop the sureties from showing it."

Where a bid is filed by a corporation, it is not necessary that the authority of the person signing accompany it. An owner attacking it must show want of authority.[18]

§ 138. **Check or Bond Accompanying Bid.**—The statute provides that "all proposals or bids offered shall be accompanied by a check payable to the order of the mayor of the city, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and by two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions." The purpose of this is to assure the board that the

16 Williams v. Bergin, 129 Cal. 461, 62 Pac. 59. To the effect that the bid and acceptance constitute a contract, see Argenti v. San Francisco, 16 Cal. 279; Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214.

17 Williams v. Bergin, 129 Cal. 461, 62 Pac. 59.

18 San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2.

bidder will enter into the contract, if awarded to him, and to penalize him for his failure so to do. "While it would be irregular for the city council to countenance a bond or certified check for an amount less than that required by the statute, the irregularity would not be jurisdictional. The preliminary bond has served its purpose when the contract has been awarded, and the subsequent undertaking conditioned upon the due performance of the work has been entered into. It does not lie with the property owner to raise an objection to the sufficiency of this preliminary undertaking after a contract has regularly been entered into, the bond for its due performance given as required by law, and the work performed to the satisfaction of the authorities."[19]

§ 139. **Bids must be Publicly Declared.**—"Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall, in open session, examine and publicly declare the same." This requirement is imperative. "It was intended thereby to secure to the property owners, the public, and the rival bidders, fair play and an honest deal. At the same time it affords some degree of security to the board against unjust charges. It is enough, however, that it is required by the statute, and compliance may be of advantage to the property owners."[20] If the proposals are opened and read in open session, they are "publicly declared" within the meaning of the statute. Thus, minutes of the board reciting that "proposals to perform the following street work were opened, read, and on motion referred to the committee on streets" sufficiently show a compliance with this provision.[21]

§ 140. **Right to Reject Bids.**—Section 5 provides: "The city council may reject any and all proposals or bids, should it deem this for the public good, and also the bid of any

19 Greenwood v. Morrison, 128 Cal. 350, 60 Pac. 971.
20 Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432.
21 City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

party who has been delinquent and unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder." In interpreting this, the Supreme Court has said: "Manifestly, under these provisions, power is conferred upon the council to determine what is for the best interests of the public; who have shown themselves delinquent and unfaithful, and who are responsible bidders. These are facts to be passed upon by the council, and its determination once reached is as conclusive as the verdict of a jury or the finding of a court upon facts within its jurisdiction. That is to say, the propriety of the action can only be inquired into by such method as the law provides."[22] Hence, the council may disregard a bid which is put in by a town official, or which is clearly collusive or fraudulent.[23] It may also reject the bid of one who, upon being awarded a former contract, refused to enter into a written contract.[24] It is not necessary that the council, in making a record of its action, state the reasons; and the fact that the minutes contain a statement of what purported to be the reason does not preclude the city from showing what in fact occasioned the act.[25] The fact that the contract is not awarded to the lowest bidder does not of itself show fraud.[1]

§ 141. **Resolution of Award.**—If the council decides to accept the lowest, responsible bid, it must award the contract to the lowest, responsible bidder. The award should be in the form of a resolution. It should be made or adopted by the council itself, and not by a committee of that body.[2]

22 Girvin v. Simon, 116 Cal. 604, 48 Pac. 720.

23 Rice v. Board of Trustees of Town of Hayward, 107 Cal. 398, 40 Pac. 551 (not a case under the Vrooman Act).

24 Girvin v. Simon, 116 Cal. 604, 48 Pac. 720.

25 Rice v. Board of Trustees of Town of Hayward, 107 Cal. 398, 40 Pac. 551 (not a case under the Vrooman Act).

1 Peckham v. City of Watsonville, 138 Cal. 242, 71 Pac. 169.

2 City of Stockton v. Creanor, 45 Cal. 643.

When the award is approved by the mayor or by a three-fourths vote of the council, there is a binding contract between the city and the contractor.[3] It would seem that no particular form should be necessary in the resolution of award. If it refers to the bid with sufficient certainty to identify it, and then accepts it, it is sufficient. Upon the award of the contract, the certified checks and bonds are returned to the unsuccessful bidders.

§ 142. Approval of Award.—The award "shall be approved by the mayor or a three-fourths vote of the city council." This does not require that the award be presented to the mayor for his approval. It must be approved by him or by a three-fourths vote of the council. The council may, if it sees fit, approve the award by a three-fourths vote and not present it to the mayor at all.[4]

§ 143. Re-advertising for Bids.—Section 5 provides for a re-advertisement for bids in two cases: (1) When the award is not approved by the mayor or by a three-fourths vote of the city council; (2) where the successful bidder does not enter into a contract within the time limited. It is not essential that the order to re-advertise contain a specific designation of a newspaper. The order will be read in connection with the original order, and if the original order contains a sufficient designation, the proceedings will be sustained.[5] The statute does not require a re-advertisement upon the rejection of bids. We have already seen that the notice to bidders need not fix any date for the reception of bids. The council may, if it sees fit, merely wait, after opening and declaring bids, for further proposals to be

[3] See Williams v. Bergin, 129 Cal. 461, 62 Pac. 59.

[4] Greenwood v. Morrison, 128 Cal. 350, 60 Pac. 971; McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909; Clarke v. Jennings (Cal.), 32 Pac. 1049.

[5] Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

made.[6] Of course, the council may, in its order, fix a time beyond which bids will not be received. The effect of such a provision has not been directly passed upon, although it has been said that perhaps, in such a case, a re-advertisement would be necessary.[7]

§ 144. **Notice of Award.**—Section 5 provides: "Notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work. It shall be published for two days in a daily newspaper published and circulated in said city and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such city, then such notice of award shall only be kept posted as hereinbefore provided." There is no provision of the act providing for the "posting of proposals"; but it is clear that the legislature meant to refer to the notice calling for proposals. The publication must be ordered by the board; and if made without such an order,[8] or in a newspaper other than that desig-

[6] Id.

[7] Id.

[8] This was the holding in early cases interpreting a similar provision: Donnelly v. Marks, 47 Cal. 187; Donnelly v. Tillman, 47 Cal. 40; Himmelmann v. Satterlee, 49 Cal. 387; Reis v. Graff, 51 Cal. 86.

In Donnelly v. Tillman, supra, the court said: "It is not doubted by the plaintiff—and there is no room for doubt—that the publication of the notice of award must be made in pursuance of an order issued by the proper board or officer—that is to say, the board or officer thereunto authorized by the statute—and that if not so made, the publication is utterly void as a notice. The plaintiff claims that this duty is incumbent on the superintendent of streets, and the defendant claims that it devolves on the board of supervisors. The power to improve the streets is granted to the board, and authority is given to it to institute and conduct the proceedings in the cases where the law requires a contract for the doing of the work. The board makes all orders up to and including the award of the contract

nated,[9] it is of no effect. It is not necessary that the newspaper designated be the one in which the official notices of the city are to be published.[10] It has been held that the giving of notice in accordance with the act and order of the board is jurisdictional.[11]

§ 145. Notice of Irregularity of the Proceedings—In General.—In 1909 the legislature added section 5½ to the act, which section reads as follows: "At any time within ten days from the date of the first publication of the notice of award of contract, any owner of or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding, prior to the date of the aforesaid notice of award, in relation to said improvement,

to the successful bidder, and in most respects it has control or supervision of all subsequent proceedings. The statute declares, that at a certain stage in the proceedings, the board shall be deemed to have acquired jurisdiction to order the proposed work to be done. These provisions lead to the conclusion that it is the intention of the statute that the board should have all the authority, in respect to the improvement of streets, which is granted by the statute, but which is not conferred expressly or by necessary implication upon some of the officers mentioned in the statute, and not, as contended by the plaintiff, that the statute grants such residuary authority to the superintendent of streets."

9 California Imp. Co. v. Moran, 128 Cal. 373, 60 Pac. 969.

10 California Imp. Co. v. Moran, 128 Cal. 373, 60 Pac. 969. In this case the court said: "This previous action of the council may have given the 'Times' some right to the advertisement, and it may have been the duty of the council to obey its own ordinance and to have ordered the resolution to be published in that newspaper." The court went on to say that the council still had power to order a publication in another paper.

11 See cases cited in preceding notes.

not made in writing and in the manner and at the time aforesaid, shall be waived, excepting as to matters directly affecting the jurisdiction of the council to order the said work of improvement."

This provision must not be confused with the provisions for protests and appeals. It relates to neither. It will be observed that it provides for no hearing whatsoever. Its evident purpose is to provide for notice of defects, so that the council may correct them before it is too late. It thus protects the contractor, for if he is advised of a defect he may refuse to proceed until it is corrected. An owner who fails to give the notice waives all defects to which the section applies. It is clearly within the province of the legislature to require an owner to assert his right to object within a specified time.

§ 146. Same—To What It Applies.—This section applies to all objections to any act or proceeding, prior to the date of the notice of award, with the exception of matters directly affecting the jurisdiction of the council to order the work. The exception has the effect of making the section applicable only to matters occurring after the passage of the resolution ordering the work and prior to the date of the notice of award. The word "jurisdiction" is used in two senses in cases involving the Vrooman Act. Any noncompliance with a mandatory provision of the statute is said to be a jurisdictional defect. The jurisdiction there referred to is clearly a jurisdiction to levy an assessment, for matters subsequent to the resolution ordering the work have been held to be jurisdictional defects. The jurisdiction referred to in this section, however, is narrower. It is a jurisdiction to order the work, and refers only to matters which are conditions precedent to the right to order the work. As to these, section 5½ requires no notice. As to matters not jurisdictional, provision is made for a petition of remonstrance; and unless objection is made, it is waived. It is

clear, therefore, that proceedings prior to the resolution ordering the work are not affected. Subsequent proceedings, however, prior to the date of the notice of award, although jurisdictional in the sense that they should be complied with in order that a valid assessment may be levied, are affected by this provision. Thus, it would seem that an owner who desires to take advantage of a failure of the council to declare the bids in open session should file written notice within the time limited, or be barred of his right to object. It would seem, however, that no notice is necessary to take advantage of a defect in the notice of award. This would be so whether the words "date of the notice of award" are construed to mean the date the notice bears on its face or the date of the first publication; for the section applies only to proceedings prior to that time, and it is only the notice as published and posted that can be objected to. As a matter of prudence, it would be well for an owner desiring to take advantage of such a defect to file the notice.

§ 147. **Property Owners' Contract.**—By the terms of section 5 "the owners of three-fourths of the frontage of lots and lands upon the street whereon said work is to be done, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first posting and publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first posting and publication of said award, it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid." This provision is indefinite, and has not been fully construed by the

higher courts. Whether or not it applies to work to be paid for under the district plan is uncertain. The wording does not exclude such work; and yet, inasmuch as the frontage on the street may be but a small part of the district assessed, it would seem doubtful if the legislature intended to grant the privilege in such a case. Where the work consists of a single improvement on two streets, the frontage on both streets is to be counted.[12] Three things seem essential to a valid property owner's contract: (1) There must be an election to take the work, signed by the owners of three-fourths of the frontage or by their agents, and filed within the prescribed time. This must be accompanied by affidavits of the signers "that they are such owners or agents." It is probable that this means that each owner or agent must make affidavit that he is the owner or agent of the owner of the property for which he signs; but the language is susceptible of the construction that each owner must make affidavit that the signers are the owners or agents of the owners of the necessary frontage. It seems to me that the former is the more reasonable construction. As a practical matter, the latter construction would require an amount of investigation by the property owners which would often be out of the question. The question as to amount can generally be determined from the face of the election itself, so that the verified statements, combined, amount to a declaration that the signers own three-fourths of the frontage. The difficulty is sometimes obviated by all the owners appointing one agent, who makes the affidavit on their behalf. Such a procedure avoids all question, for the agent can make affidavit that he represents the necessary frontage. No particular form for the election is required. It is possible that the mere entering into a contract, accompanied by the required affidavits, would be a sufficient election. The duty of determining whether the necessary number have signed is left

12 Mahoney v. Braverman, 54 Cal. 566. Compare Cochran v. Collins, 29 Cal. 129, decided under an old act.

to the superintendent of streets, and his decision is conclusive.[18]

§ 148. **Same—Continued.**—(2) The second requirement is that a contract shall be entered into within ten days after the first posting and publication of the award. The only uncertainty in this provision is as to who are proper parties to the contract. The statute provides that "the owners . . . . or their agents . . . . may . . . . elect to take the work and enter into a written contract." The question arises as to whether this authorizes an agent to take the contract in his own name. The sentence quoted, read alone, might be construed to permit this. Subsequent sentences, however, refer only to contracts by owners. It is possible to construe the sentence quoted, read in connection with what follows, as merely authorizing the agent to make the election and to sign the contract in the name of the owner. In any event, there would seem to be no question but that all the owners may appoint one agent, and that he may execute the contract in the names of all. (3) The third requirement is that work must be commenced within fifteen days after the first posting and publication of the award. In this respect the rights of the owners are limited more strictly than those of other contractors. Section 6 provides that the superintendent of streets shall fix the time for commencement, "which shall not be more than fifteen days from the date of the contract." In the case of property owners' contracts the time may be considerably shorter.

§ 149. **When Original Bidder is Entitled to Contract.**—Section 5 provides: "Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first posting and publication of said award, and to prosecute the same with diligence to completion, it shall be

[18] Fairchild v. Wall, 93 Cal. 401, 29 Pac. 60.

the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid." And the superintendent of streets must enter into the contract within the time prescribed by the statute. A contract prematurely entered into is said to be beyond the jurisdiction of the superintendent of streets, and is not made valid by a failure to appeal.[14] The time begins to run from the date of the first publication of the notice of award. The law does not require the lapse of one day before the time begins to run. Thus, in one case the notice of award was published on the 8th and 9th of November, and the contract was entered into on the 19th of November. It was held that the 18th of November was the last of the ten days within which the property owners might elect to take over the contract, and that the contract of the 19th was not premature.[15] The statute not only fixes the time before which the contract must not be made, but it also fixes the term within which the contractor must execute it or forfeit his deposit. Where the last day of the period falls upon a holiday, the contractor has the whole of the next day in which to execute it.[16] A contract entered into after the expiration of the time limited is void, unless it appears that the delay was not caused by the fault of the contractor; and a complaint showing a contract entered into after the legal time does not state a cause of action unless

[14] Burke v. Turney, 54 Cal. 486. In this case the court said: "The premature action of the superintendent was one which affected his power or jurisdiction. His action was void; and that which was void does not become valid by reason of a failure to appeal. The property owners were not aggrieved; and the failure of the contractor to appeal did not operate, first, to create a grievance on the part of the defendants; and second, to estop them from complaining of it." See, also, Manning v. Den, 90 Cal. 610, 27 Pac. 435; California Imp. Co. v. Quinchard, 119 Cal. 87, 51 Pac. 24.

[15] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

[16] Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283. As to the effect of special holidays, see Ralph Rogers Co. v. Workman, 10 Cal. App. 612, 103 Pac. 154.

it alleges facts bringing the case within the exception.[17] Where a superintendent of streets improperly refuses to enter into the contract, he may be compelled to do so by mandamus.[18]

§ 150. Forfeiture for Failure to Enter into Contract.— The statute provides that "if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city, and shall be collected by it and paid into its fund for repairs of streets; and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund." This being a statutory forfeiture, the ordinary equity rules as to relief from forfeitures do not apply.[19] This provision applies, however, only to cases in which the council has legally acquired jurisdiction to order the work. In discussing this point, Mr. Justice Henshaw said: "Plaintiff averred and proved facts fully establishing the illegality and invalidity of the proceedings which led up to and were to have culminated in a contract. By entering into such a contract it would have received nothing. It could have looked neither to the city nor to the property owners for recompense for its labor. The street law contemplates a forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, not for a failure to enter into a contract which, so far as the contractor is concerned, is mere waste paper, and under which he would expend money and labor without the possibility of remuneration. In such a case, the promise of the contractor, accompanied by his certified check, is a naked offer, met and supported by

17 Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310.

18 Genilla v. Hanley, 6 Cal. App. 614, 92 Pac. 752.

19 Upon this proposition see 1 Pomeroy's Equity Jurisprudence, sec. 458, and cases there cited.

no consideration. There is no estoppel. The contractor has received no benefit, the city has sustained no injury. Upon such a total failure of consideration, a promise resting upon expected benefits, which can never be received, is no longer binding, and a deposit of money, accompanying such a promise, is recoverable at law."[20]

§ 151. Contractor's Bond to Secure Performance.—Two bonds are required of the contractor. Section 5 provides: "All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets of said city, with two or more sureties and payable to such city, in such sums as the mayor shall deem adequate. conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above all statutory exemptions." This requires the execution of the bond at the time of the execution of the contract, but it is not likely that a prior execution would render an assessment void.[21] Where the dates in the bond and in the contract conflict, but the bond refers to a contract "of even date," the court is justified in finding that they were executed at the same time.[22] The fact that the

20 N. P. Perine Con. Co. v. City of Pasadena, 116 Cal. 8, 47 Pac. 777.

21 See Byrne v. Luning (Cal.), 38 Pac. 454; Miller v. Mayo, 88 Cal. 568, 26 Pac. 264.

22 Byrne v. Luning (Cal.), 38 Pac. 454. In this case, the court said: "The true date of the execution of bond was the time of its delivery. It recites that it is of even date with the contract. If this recital is true, it follows that there was a mistake of one day in the date of either the bond or the contract, and that such mistake is immaterial. At all events, the recital in the bond neutralizes the tendency of the written dates to prove that the execution of the bond was not contemporaneous with that of the contract; and, in this state of the evidence furnished by the bond and contract, the court was justified in finding that it did not overcome the prima facie case for plaintiff made by the warrant, assessment, diagram, etc." It

bond is approved by the board of trustees instead of by the superintendent of streets does not affect the validity of an assessment. "A failure to execute a bond that should be satisfactory to the superintendent of streets might be a sufficient reason for the superintendent to refuse to enter into the contract with the contractor, but after the work has been completed to the satisfaction of the superintendent of streets, the property owner cannot object to the correctness of the assessment by reason of the omission on the part of the superintendent to approve the bond of the contractor."[23]

§ 152. **Contractor's Bond to Protect Laborers and Materialmen.**—The second bond which the contractor must give is a bond to protect laborers and materialmen. The mechanic's lien statutes do not apply to work done under public contract, for the reason that the work is not done at the instance of the owner. Neither does the provision of the Code of Civil Procedure allowing mechanics and materialmen to serve a notice to withhold apply; for it is confined to the persons mentioned in section 1183 of the same code. Hence, to protect those who furnish labor and materials to the contractor, the legislature, in 1899, adopted section 6½, which reads as follows: "Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor or furnish mate-

would seem, however, that in such a case there must be a sufficient reference to the contract to positively identify it.

23 Miller v. Mayo, 88 Cal. 568, 26 Pac. 364.

rials to be used in the said work of improvement, and shall provide that if the contractor, person, company, or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company, or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof."

§ 153. **Same—Validity of This Provision.**—The constitutionality of this provision has not been settled by the higher courts, and it would seem to be a debatable question. We have already seen that the power to assess exists only for a public purpose. "The taxing power, whether it be executed in the form of general taxation or of local assessment, cannot be upheld, when the purpose in view can be judicially seen to be other than public."[24] Moreover, local assessments are upheld upon the theory of benefits. It is arguable that a bond solely for the protection of laborers and materialmen is not for a public purpose; and it may also be said that it does not benefit the property. The requirement of

[24] In the Matter of Market Street, 49 Cal. 546.

such a bond clearly tends to increase the cost to the owners, for the contractor must consider its cost to him in making his bid. It might therefore be said to cast an unauthorized burden upon the property owner.[25] Upon the other hand, the section may be upheld upon one of two theories. (1) It may be said that the requirement, by protecting claimants, makes the quick completion of the work more probable, because parties might hesitate to furnish labor or materials upon the personal credit of the contractor alone. This might be said to constitute a public purpose.[1] (2) It is arguable that this requirement is merely incidental, that the increased cost is likely to be so small as to be unworthy of consideration, and that it is a reasonable regulation as to the procedure.

§ 154. **Same—Construction.**—This section is not to be given the same strict construction which is applied to mechanic's lien statutes. It is a remedy regarded with favor by the courts and its provisions will be liberally construed. Accordingly, it has been held, in construing a similar statute requiring a bond for municipal work, that the claim may be filed prior to the time of completion of the improvement. The words "within thirty days" are held to mean "not beyond thirty days."[2] It is held that not only may persons

[25] A somewhat similar provision in the mechanic's lien law has been held unconstitutional, but the reasoning in the cases so holding is not directly applicable here: See Gibbs v. Tally, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815, and cases following it.

[1] The bond given by the contractor to secure the faithful performance of his contract in theory protects the city; but as a practical proposition, it cannot fully compensate for the inconvenience caused by a partially completed street. It is a matter of common knowledge that materialmen frequently furnish materials to an irresponsible contractor, relying upon their remedies under the mechanic's lien statutes, and this in many instances is for the direct benefit of the owner. The same thing might easily happen in street cases.

[2] In French v. Powell, 135 Cal. 636, 68 Pac. 92, the court said: "The construction we would give the word 'within' is not unusual or strained, as will be seen from cases cited by respondent. 'Within ten days after service' of a notice of a commissioner's report, the

furnishing material and labor to the contractor recover upon the bond, but that persons furnishing such materials or labor to a subcontractor, or to an assignee, are likewise entitled to its benefits.[3] The claim need not be filed by the person who actually performs the work but may be filed by his employer.[4] The provision for an attorney's fee is probably not constitutional. A similar provision in the mechanic's lien law has been held unconstitutional upon the ground that there is no reason for granting an attorney's fee in such cases to the plaintiff when he recovers and not to the defendant when he is successful.[5] This principle has been held inapplicable to suits to foreclose street liens, upon the ground that such liens are in the nature of taxation and that there is therefore reason for the distinction.[6] The reason for the

term 'within' was held to mean 'not beyond,' a definition given by Worcester and Webster. (Chicago etc. R. R. Co. v. Eubanks, 32 Mo. App. 184.) And so of the statute of frauds; it was held in Sanborn v. Fireman's etc. Co., 16 Gray (Mass.), 448, 77 Am. Dec. 419: 'When time is spoken of, any act is within the time named that does not extend beyond it.' And in Atherton v. Corliss, 101 Mass. 40, a statute provided that a widow might waive the provision for her in her husband's will, 'at any time within six months after the probate of the will'; it was held that a waiver made two months before probate was sufficient, and it was said: 'The main purpose undoubtedly is to fix a time when her right of election shall cease, and the presumption of the statute shall become absolute.' And so where a statute which gave a lien on ships required a certificate to be filed 'within four days from the time of the vessel's departure from port,' it was held that this 'allows it to be filed at any time before the expiration of the four days.' (Young v. Orpheus, 119 Mass. 179.) So, also, in the matter of filing claims against an insolvent estate within nine months after declaration of insolvency. A claim was held properly filed before such declaration. (Levert v. Reed, 54 Ala. 529.)"

[3] French v. Powell, 135 Cal. 636, 68 Pac. 92.

[4] French v. Powell, 135 Cal. 636, 68 Pac. 92.

[5] Builders' Supply Co. v. O'Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712 (the leading case); Merced Lumber Co. v. Bruschi, 152 Cal. 372, 92 Pac. 844; Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983; Burnett v. Glas, 154 Cal. 249, 97 Pac. 423; Raphael Co. v. Grote, 154 Cal. 137, 97 Pac. 155.

[6] Engebretsen v. Gay, 158 Cal. 30, 109 Pac. 880, 28 L. R. A., N. S., 1062.

distinction in cases of foreclosure does not apply to an action upon the bond. Hence it would seem that the mechanic's lien cases are applicable.

§ 155. **Deposit of Incidental Expenses.**—Section 5 provides: "Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of the publication of notices, resolutions, orders, or other incidental expenses and matters required under the proceedings prescribed in this act, and such other notices as may be deemed requisite by the city council. And in case the work is abandoned by the city before the letting of the contract, the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury." This provision is for the benefit of the persons who are entitled to the money for the incidentals, and may be waived by them. Construing this, the Supreme Court has said: "Every statute must have a reasonable construction, made in view of the purposes of the enactment. This provision was made for the benefit of those to whom such expenses were payable, and for the protection of the city or the superintendent of streets. It is not a matter which can in any way affect appellant, or others whose property may be assessed for the construction of the sewer. It neither increases nor diminishes the amount of the assessment, whether these expenses are advanced by the contractor or paid afterward. Suppose the persons entitled to these incidental expenses had given the bidder receipts showing payment in full, and these receipts were exhibited to the superintendent of streets, must he still require the bidder to pay to him the amount of these expenses already paid, and, if he fails or refuses to do so, decline to enter into the contract? Or would such direct payment by the bidder to these third persons instead of the street superintendent make the contract invalid if it should afterward be entered

into? If not, the written waiver above mentioned would not have the effect to invalidate the contract."[7] It is the duty of the superintendent of streets to pay the incidental expenses from the amount advanced and if he fails to do so, he may be compelled by mandamus.[8]

§ 156. **The Formal Contract—In General.**—Section 6 authorizes the superintendent of streets "in his official capacity, to make all written contracts, and receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act." The formal contract is made, not in the name of the city, but in the name of the street superintendent in his official capacity. "The board of supervisors and the superintendent of streets are each only an agent of the municipality with limited and defined powers, and the power conferred upon the municipality to improve its streets at the expense of the adjacent owners, although exercised through these agents, is, in effect, exercised by the municipality itself. The superintendent of streets is the ministerial officer to enter into the contract with the person to whom it is awarded, but the contract is entered into by him on behalf of the city, and the bond for its performance is to be executed to the city."[9] As he acts ministerially only in preparing and executing the formal contract, the superintendent can only enter into the contract already agreed upon.[10] Hence he has no right to contract for more nor for less than has been ordered by the council.[11] The contract must de-

7 Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658.

8 Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635.

9 Warren v. Chandos, 115 Cal. 382, 47 Pac. 132.

10 Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214; Dougherty v. Hitchcock, 35 Cal. 512. See, also, Nicolson Pavement Co. v. Painter, 35 Cal. 699.

11 Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214. In several of the cases where this is said, the real defect was a variance between the resolution of intention and the resolution ordering the work. Such cases are clearly mere dicta on this point.

describe the same work that is described in the resolution of intention.[12] The superintendent is held strictly to his authority.[13] Where the contract is absolutely void, a failure to appeal does not waive the defect.[14]

§ 157. Same—Effect of Including Too Much Work.—The fact that a contract calls for more work than is authorized does not necessarily make it void in its entirety. If the valid part is separable from the invalid, so that it is possible to determine definitely the cost of the valid part of the work, the contract will be upheld to the extent that it calls for authorized work.[15] Thus, where the contract calls for work on one block more than is authorized by the resolution ordering the work, but the price is to be paid at a certain price per foot of work, it would seem clear that the contract may be sustained to the extent that it is authorized. On the other hand, if the price is stated as a lump sum, it would seem that the contract is void in its entirety.

[12] Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; McBean v. Redick, 96 Cal. 191, 31 Pac. 7; Emery v. San Francisco Gas Co., 28 Cal. 345; Beaudry v. Valdez, 32 Cal. 269; Himmelmann v. Satterlee, 50 Cal. 68.

[13] Brock v. Luning, 89 Cal. 316, 26 Pac. 972 (under an old statute). In this case, the award fixed the time for completion. The contract fixed a different time. The court said: "If he can thus diverge from the letter of his authority to the extent of five days, he can do so for five thousand, and so the very object of the law . . . . is done away with, and the discretion of the superintendent of streets, not contemplated by the Street Act, is substituted." Of course this case is not authority now upon the exact point decided; for the Vrooman Act expressly confers this discretion upon the superintendent of streets. See, also, Chambers v. Satterlee, 40 Cal. 497, opinion of Crockett, J.

[14] McBean v. Redick, 96 Cal. 191, 31 Pac. 7. And see post, secs. 257, 262, 263.

[15] Beaudry v. Valdez, 32 Cal. 269. See, also, Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327; Chambers v. Satterlee, 40 Cal. 497. And see cases cited in last section.

As to effect of variance between the resolution of intention and resolution ordering the work, see ante, secs. 131, 132.

As to the effect of assessment for too much, see post, sec. 255.

§ 158. Same—Entire Contract must be in Writing.—The statute requires a written contract, and this means that the entire contract must be in writing. Written specifications adopted for the work should be referred to sufficiently to identify them. If they are referred to as annexed and are not annexed, the contract is void.[16] In explaining this apparently harsh rule the Supreme Court has said: "Plaintiff contends that, inasmuch as bids were received to do the work in accordance with the specifications, which, in the advertisement for bids, were specifically referred to, and as the superintendent of streets was not authorized to reduce to writing any other contract than that made by the board, there could be no mistake as to the specifications, and, as the work has been done strictly in accordance with them, the objection cannot now be made. If the contract were one entered into by the taxpayer individually, there would be no answer to this position. But this is a proceeding to fix upon property a lien, in invitum, and it has been held that in such case every requirement that could be of benefit to the person to be charged must be complied with. It cannot be said that there is no possible benefit to the owner in having a written contract signed by the contractor. In this case the contractor was required to give a bond with sureties for the faithful performance of the contract. This bond, to be valid, must be conditioned that the contractor will perform the contract entered into by him. Sureties are bound only and may insist upon the very letter of their contract. In this case would there be any contract by which they would be bound? The statute requires the contract to be in writing and signed by the contractor. The contract signed does not define the work to be done, nor does it refer to any specifications in which it is described. It not only does not refer to specifications filed, but negatives such reference by express reference to those attached. It is said that the owner might

[16] Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065; Gray v. Richardson, 124 Cal. 460, 57 Pac. 385.

have had this corrected by appeal to the board. But an appeal to the board could not have provided the security by a written contract, and sureties for its performance, without which there was no binding contract. If the assessment had been vacated and the work rejected it would not then have been in the power of the board to supply this defect. The case seems a hardship, but it must be remembered that it is a proceeding to charge one with the cost of improvements for which he has not contracted. The liability depends upon a strict compliance with the law, and not upon the equities of the claimant."[17]

§ 159. **Same—Execution.**—The contract must be signed by the contractor or by someone duly authorized by him. Authority of the person signing is to be presumed, and the burden of showing want of authority is upon the party claiming that it did not exist.[18] Where the contractor is a corporation, it is not necessary that the corporate seal be attached; and a failure to attach the seal does not throw the burden of proving the authority upon the corporation.[19] It is not necessary that authority for an officer of a corporation

[17] Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065, per Temple, J.

[18] City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916; Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

[19] In City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916, the court said: "While the affixing of the corporate seal to a contract is presumptive evidence that the execution of the contract was authorized by the corporation, it is not essential to the validity of such contract. The person executing the contract may have been authorized by a resolution of the corporation entered upon its records, and the corporation may have adopted a corporate seal. A contract in such case will be valid. It was not necessary for the plaintiff at the trial of this action to prove the authority of McDonald. It was incumbent upon the defendants to prove that he did not have authority to execute the contract, if they would rely upon such objection. As was said in San Francisco Paving Co. v. Bates, 134 Cal. 39, 66 Pac. 2, in reply to a similar objection, there may have been ample proof before the superintendent of streets that the execution of the contract and the bond had both been authorized by the corporation."

to execute such a contract be express. Where, in the regular course of business, it is customary for an official to sign such contracts, and this is known to the directors, the authority will be presumed.[20] Where there is a question as to authority, the owner's remedy is by an appeal to the council; and a failure to take such an appeal will constitute a waiver of the defect.[21]

§ 160. **Same—Provision as to Superintendence.**—Section 6 provides: "The work provided for in section 2 of this act must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, and all contracts made therefor must contain a provision to that effect." It is not necessary that the contract follow the precise language of the statute. It is sufficient if it can be held to contain the condition in question by a fair and reasonable construction. Thus, a clause that the contractor shall do the work "in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of streets . . . . in compliance with the specifications hereunto attached, and made part of this contract," is sufficient.[22] Under an old statute requiring the contract to contain a provision that "the materials used shall be such as are required by the superintendent of streets," a clause that "the party of the first part promises . . . . to do and perform, or cause to be done and performed, in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent, and furnish all the necessary materials required for the execution and completion," was held sufficient.[23] This provision confers upon the street superin-

20 Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

21 Oakland Pav. Co. v. Rier, 52 Cal. 270.

22 Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

23 Taylor v. Palmer, 31 Cal. 240. See, also, Emery v. San Francisco Gas Co., 28 Cal. 345.

tendent "not merely the power to see the specifications carried out, but a power or discretion beyond the specifications. This power is of course limited by the contract, and by the specifications as part thereof, but extends to all questions of detail not explicitly determined by the specifications, or the contract; and with reference to such questions his own judgment is by the express terms of the law, and of the contract itself, made the criterion."[24]

§ 161. Same—Notice That City will not be Liable.—All contracts must "express notice that, in no case, except where it is otherwise provided in this act, will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed." This stipulation would seem, if it were not for the express requirement, to be superfluous. When the contract is entered into, the parties have the statute before them, and contract with its provisions in mind. These provisions, in effect, form a part of the contract, without any allusion to them.[25] The only purpose of the stipulation, apparently, is to call the attention of the contractor to the limitations of the statute. The provision, then, being entirely for the benefit of the contractor, it would seem that its omission should not affect the validity of the contract. Neither the city nor the property owner can be injured thereby. It is to be noted that such a provision as this can have application only to a valid contract. Conceding for purposes of argument that it confers some benefit upon the city, it is clear that if the contract is void this provision must fall with it. An officer can execute only such contracts as are authorized, and if it is unauthorized, it cannot bind the city. Hence, the most this provision could possibly do is to limit the recovery upon a valid contract. While this seems of little effect as a stipulation in

[24] Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078.

[25] Lucas v. City of San Francisco, 7 Cal. 472. As to nonliability of the city upon a void contract, see post, sec. 179.

the contract, it is important as an express legislative expression that the city shall not be liable.

§ 162. **Same—Provision as to Liability for Work Done in Front of Public Property.**—By the 1911 amendment of subdivision 8 of section 7, where the cost of work in front of public property is to be paid for out of the public funds, the contract should contain a provision to that effect. It would seem well, in all cases where public property is within the assessment district, to state exactly the liability for work done in front of it.

§ 163. **Same—Provision for Minimum Compensation of Laborers.**—In 1897, the legislature passed an act providing as follows: "The minimum compensation to be paid for labor upon all work performed under the direction, control, or by the authority of any officer of this state acting in his official capacity, or under the direction, control, or by the authority of any municipal corporation within this state, or of any officer thereof acting as such, is hereby fixed at two (2) dollars per day; and a stipulation to that effect must be made a part of all contracts to which the state, or any municipal corporation therein, is a party; provided, however, that this act shall not apply to persons employed regularly in any of the public institutions of the state, or any city, city and county, or county."[1] This probably applies to contracts made under the Vrooman Act.[2] But whether applicable or not, the insertion of such a stipulation in the contract will not affect its validity.[3]

§ 164. **Same—Right to Insert Provisions not Required.**—Provisions not required by statute may be inserted in the

1 Stats. 1897, p. 90.

2 See Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431, interpreting another provision. If this case is correctly decided, the statement in the text would seem to be true.

3 Flinn v. Peters, 3 Cal. App. 235, 84 Pac. 995.

contract, provided they do not limit in any way the rights of the city or the property owners. These superfluous provisions, although void in themselves, will not affect the validity of the contract if separable. Thus, a provision that neither the superintendent of streets nor his bondsmen shall be liable for any delinquency on the part of the superintendent does not render the contract void.[4] It is probable that this provision is void, for the reason that the superintendent of streets has no authority to require or make it; but it is easily separable from all other provisions of the contract, and therefore does not vitiate any one of them. The owners are not affected because they are not parties to the contract. A provision that there shall be no assessment upon the adjoining property for the improvement of that part of a street occupied by a railroad company, and that compensation for such work shall be collected from the railroad company, does not render the contract void.[5] It could not possibly injure the property owner. Again, a provision that the contract price shall be payable in gold coin, although unauthorized, does not affect the validity of the contract.[6] The courts, in entering judgment, will disregard such a provision.

§ 165. **Same — Same — Stipulation Limiting Hours of Work.**—We have already seen that the provision of the Penal Code limiting the hours of work upon public work does not apply to contracts under the Vrooman Act; and we have also reached the conclusion that in the absence of express charter provision the specifications cannot limit the contractor in this regard.[7] Where, however, the specifications and notice calling for bids are silent in this respect, the insertion of a provision in the contract limiting the hours of

[4] Byrne v. Luning (Cal.), 38 Pac. 454; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337; McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808.

[5] Perine v. Forbush, 97 Cal. 305, 32 Pac. 226.

[6] N. P. Perine Contracting Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

[7] See ante, sec. 126.

labor to eight hours per day does not render the contract void.[8] In such a case it is clear that the cost to the property owner is not increased. Property owners cannot set up as a defense to an action upon an assessment that such a provision in the contract has not been followed.[9] It would seem that the same principle should apply to a stipulation that only union labor shall be employed. A provision that no Chinese labor shall be employed does not render the contract void.[10]

§ 166. Fixing Time for Commencement and Completion. Section 6 provides that the street superintendent "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him." This provision is mandatory, and a contract not in accordance with its terms is void.[11] In construing this, it has been said: "Within the limits fixed by the statute, the superintendent of streets has the power expressly given him to fix the time for the commencement and completion of the work.

8 Flinn v. Peters, 3 Cal. App. 235, 84 Pac. 995. In this case the court said: "There is nothing to show that the specifications or the notices for bids contained any statement that the person to whom the contract should be let would be required to make a contract with the objectionable clause as to hours of labor and as to minimum wages therein. The plaintiffs were the lowest bidders for the contemplated street improvements. No objection was made in any way to the board of public works or to the board of supervisors, as to regularity of the notices or specifications. The contract having been thus regularly let to the lowest bidder, it was no concern of the defendants as to any provision of the contract solely affecting the cost of the improvements to the contractor. It is not a matter of concern to the defendants as to the wages paid by the contractor, and the number of hours the laborers should work per day."

9 Flinn v. Peters, 3 Cal. App. 235, 84 Pac. 995; Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908.

10 Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

11 Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310; Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, 1080; Buckman v. Ferguson, 108 Cal. 33, 40 Pac. 1057.

It is not a matter left to be fixed by the agreement of the contractor and superintendent. The contractor makes his bid in view of the power given to the superintendent and its limitations, and it is only necessary that it should be definitely fixed with the knowledge of the contractor, and the time thus fixed then enters into, and becomes a part of, the contract. The time may be fixed either in the body of the contract, or, as here, indorsed upon it with the knowledge of the contractor, and authenticated by the official signature of the superintendent. . . . . The statute and the indorsement makes it part of the contract without the signature of the contractor to the indorsement."[12] The superintendent need not perform this duty upon the day he signs the contract. He may do it at any time after the date of the contract which will allow him to designate a period of not more than fifteen days from the date of the contract. If his term of office expires before the expiration of the fifteen days, this act may be performed by his successor. "The act of fixing these times is the act of the officer, and not of the individual. . . . . The execution of the contract being inchoate on his part until this act is performed, it is immaterial that one of the steps in the completion of its execution is performed by the outgoing officer, and the other by his successor."[13] The word "time" as used in this provision does not mean a particular day upon which work is to be commenced. The superintendent is merely required to fix the time within which work must commence. Thus, a provision for "the work to be commenced within ten days from the date hereof, and its completion to be within two hundred and forty days thereafter" has been held sufficient.[14] The

12 Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658. See, also, Buckman v. Ferguson, 108 Cal. 33, 40 Pac. 1057; Buckman v. Hatch (Cal.), 70 Pac. 221.

13 Buckman v. Ferguson, 108 Cal. 33, 40 Pac. 1057.

14 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920. See, also, Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, 1080. In the latter case the court said: "The superintendent did not fix any day for the commencement of the work—the allegation that he fixed the 'time' there-

word "thereafter" is held to refer to the date of the contract, so that the time for completion is certain. In several cases, stipulations that the work shall be commenced within fourteen or fifteen days from the date of the contract have been upheld as sufficient designations of the time for commencement.[15]

§ 167. Work must be Completed Within Time Limited, or Within Valid Extensions.—In order to be entitled to recover for his work, the contractor must complete it within the time limited, or within a valid extension thereof.[16]

for to be 'within fifteen days' from the date of the contract left to the contractor to determine the particular day within that time on which he would begin his work (Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337), and, as he could not know in advance upon what day the contractor would begin the work, it cannot be assumed that the superintendent intended the time for its completion to run from that day, as that would be to permit the contractor rather than himself to fix the time for its completion. As the superintendent must be deemed to have acted legally, and as his act, if possible, is to be construed so as to make it effective rather than nugatory, it must be held that the word 'thereafter' in this averment of the complaint refers to the date of the contract, and that the superintendent fixed the time for completing the work to be within one hundred and eighty days after the date of the contract."

[15] Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658; White v. Harris, 103 Cal. 528, 37 Pac. 502; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337; Williams v. Bergin, 127 Cal. 578, 60 Pac. 164. In McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808, the court said: "If the statute had provided that the work must be completed within a certain time after its commencement, it might be of some importance to fix the very day on which it should be commenced; but there is no such provision, the time of completion being left to the discretion of the superintendent. In the case at bar he fixed ninety days from the date of the contract for the completion, and within fourteen days from said date for the commencement of the work. The date of the contract was June 9th; and if, instead of saying 'within fourteen days' he had named the fourteenth day, which would have been June 23d, the effect would have been the same. Under the present condition of the statute we really can see no importance attaching to this contention."

[16] See Turney v. Dougherty, 53 Cal. 619; Beveridge v. Livingstone, 54 Cal. 54; Mahoney v. Braverman, 54 Cal. 565; Fanning v. Schammel,

This requirement is for the benefit of the lot owners and the general public, and is strictly enforced. It becomes important, therefore, to determine when and under what circumstances extensions may be granted.

§ 168. Extensions of Time—Right to Grant Before Expiration of Time Fixed.—Section 6 provides that the superintendent "may extend the time so fixed from time to time, under the direction of the city council." The power to make the extension is vested in the council.[17] The duty of the superintendent of streets is ministerial only. The statute implies that the extension may be indorsed upon the original contract, but there is no direct requirement to that effect. Such indorsement is not the extension, but merely evidence of it.[18] The extension need not, therefore, be indorsed upon the contract before its expiration;[19] although, as we shall see, the council has no power to extend after that time. The council is not otherwise limited by the provisions of the statute either as to number or time. It is within its power to grant an additional extension before an extension previously granted has taken effect. "Any number of extensions and for any period may be granted at any time by the board or council before the expiration of the contract, provided, always, that the work, up to the time of the making of the application, is shown to have been prosecuted with diligence in accordance with the requirements of the statute. And in the absence of a showing to the contrary, it will be

68 Cal. 429, 9 Pac. 427; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353; Heft v. Payne, 97 Cal. 108, 31 Pac. 844; Mappa v. Los Angeles, 61 Cal. 309. See, also, cases cited in notes to following sections.

17 McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025.

18 McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025.

19 McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. See, also, Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

presumed that the action of the board or council in granting such extension was based on a proper showing, and such extension begins to operate from the expiration of the previous extension, and not from the time that it was granted."[20] No particular form is required for the resolution extending time. It is not jurisdictional in the absolute sense, but an act in the exercise of jurisdiction which it is assumed has been vested in the council. Hence, a description of the work sufficient to indicate as between the board and the contractor what contracts it was intended to extend is sufficient.[21] A resolution describing the work but naming the wrong contractor is sufficient.[22] An extension does not create a new contract. It is merely "a pursuance of the original contract under rights existing by virtue of the law under which it was made."[23] The provisions for an extension become a part of the contract, and constitute a right which cannot be impaired by a subsequent change of the statute or constitution.[24]

§ 169. **Same—No Right After Time has Expired and While Contractor is in Default.**—Neither the council nor the superintendent of streets has any authority to extend the contract after the time for completion, with extensions lawfully granted, has expired.[25] "It would virtually be the

[20] Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025. In general, as to the right to extend, see the following early cases: Conlin v. Seamen, 22 Cal. 546; Houston v. McKenna, 22 Cal. 550; Taylor v. Palmer, 31 Cal. 240; Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467. Taylor v. Palmer, supra, goes further than the later cases. All of the foregoing should be read only in connection with the statutes they interpret.

[21] Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432.

[22] Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266.

[23] Oakland Pav. Co. v. Barstow, 79 Cal. 45, 21 Pac. 544; Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767.

[24] Oakland Paving Co. v. Barstow, 79 Cal. 45, 21 Pac. 544; Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767; Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

[25] Turney v. Dougherty, 53 Cal. 619; Beveridge v. Livingstone, 54 Cal. 54; Mahoney v. Braverman, 54 Cal. 565; Fanning v. Schammel,

making of a new contract. Before the extension of time it is obvious that the contractor could claim nothing under the contract, and it would be as impossible for him to attempt to do so as it would be if he had abandoned the contract, or rescinded it as far as he had power so to do. If the board exercises that power, it would seem difficult to assign any limits to its exercise; and the board might, by that process, infuse life into contracts under which nothing had been done for an indefinite number of years—and perhaps contracts, as well, which had formally been abandoned, or from which the contractor had been released. The exercise of that power would materially tend to impair whatever certainty there was in the proceedings under the act for the improvement of streets, and thus seriously jeopardize the interests of the property holders to be charged with the expenses of the work. It might be that the property holders, at a given time, were willing to incur the expenses of the work, but circumstances might change to such an extent, in the course of a few years, that they would be quite unwilling to have the work done at the rates mentioned in the contract; but if the power claimed in this case pertains to the board, they would be powerless to resist, though the board or former boards may repeatedly have refused to extend the time."[1] This rule does not apply merely in favor of property owners, but applies to the city as well in cases where it provides for work on accepted streets.[2] The statute is said

68 Cal. 429, 9 Pac. 427; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22; Dougherty v. Nevada Bank, 81 Cal. 162, 22 Pac. 513; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353.

In Taylor v. Palmer, 31 Cal. 240, under an old statute containing a provision that "in all cases where the superintendent, under the direction of said board, has extended the time for the performance of contracts, the same shall be held to have been legally extended," the opposite conclusion was reached.

1 Turney v. Dougherty, 53 Cal. 619.

2 "The provision which is construed to prohibit the extension of the time of performance after the expiration of the time named in

to make time of the essence of the contract. The fact that the extension is made with knowledge of the incompleteness of the work, and that the contractor thereupon expends money to complete is immaterial.[3] It is said that even the legislature cannot validate a contract after the expiration of the time for doing the work.[4]

§ 170. **Same—Same—Exception Where Council Rejects Work Accepted by Superintendent of Streets.**—Where the work has been accepted by the superintendent of streets but is rejected by the council after the expiration of the time limited in the contract, the council may extend the time for a proper completion. In discussing this, the Supreme Court has said: "Appellant contends that as the work was not completed within the period of two hundred and fifty days from the date of the contract, and as the subsequent extension was

the contract, or any previous extension, evidently was not intended simply to protect abutters, because the same provision in terms applies where the owners themselves undertake to perform the work. It seems to have been the intention of the legislature to secure punctual completion of street improvements, whoever might undertake them, and to prevent the revival of contracts long after they had expired, and at a time when, under a new contract, the improvement might be made more cheaply. The object is equally important whether work is to be paid for by the city, or by the owners, and there is no reason why an improvement on an unaccepted street should be completed within the time prescribed in the contract, while contractors for work on accepted streets should be permitted to perform the work at their leisure, under grants or extensions made through the grace or improvidence of the board of supervisors. 'Accepted streets' are generally in those portions of the city in which traffic and travel are greatest. It would seem that greater promptitude should be required with respect to them than in the case of unaccepted streets": Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22.

[3] "A knowledge that the work has not been completed is presumed always from the fact of extension": Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22.

[4] Fanning v. Schammel, 68 Cal. 429, 9 Pac. 427. See, also, People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; People v. McCune, 57 Cal. 153; Brady v. King, 53 Cal. 44.

not made until after the expiration of that period, the contract had expired before the acceptance of the work, and the assessment therefor was invalid and created no lien. We are of the opinion, however, that this objection cannot be sustained. The contract provided, in accordance with the express requirements of the statute, that the contractor would do and perform the work 'under the direction and to the satisfaction of the street superintendent.' The provision therein fixing two hundred and fifty days as the time for the completion of the work must refer to the completion of the work according to the terms of the contract—that is, to the satisfaction of the street superintendent and under his direction; and, in the absence of any charge of fraud or collusion, it must be held that upon such completion of the work within the time limited the contractor had sufficiently fulfilled the condition of his contract to prevent a forfeiture thereof by reason of the subsequent disapproval by the city council of such acceptance. The utmost that could be claimed in support of the appellant's contention would be that, if the superintendent's acceptance was set aside, the time thereafter required for the final completion of the work should be counted as a portion of the time originally fixed for its completion. While the appeal from the act of the superintendent in accepting the work was pending before the council and undetermined, the running of the time originally fixed for the completion of the work was suspended and the work was completed within the time granted by the council at the time it set aside the superintendent's acceptance.''[5]

§ 171. **Same—Omissions of City Officials Do not Constitute an Extension.**—Neither the failure of the city to furnish implements as agreed, nor a failure of the council to act upon a request for an extension, will operate as an ex-

[5] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. In an earlier case, however, it was held that the action of the council in setting aside a first assessment and warrant does not operate to extend the time: Heft v. Payne, 97 Cal. 108, 31 Pac. 844.

tension of time. "The lot owner in such cases is in no sense a party to the contract, except as one of the public upon whose property the burden of payment for the improvement is placed. The city does not act as his agent, to bind him personally, but in its sovereign capacity, as in matters of taxation, and the failure of the city to furnish the steam roller is no more binding upon him than would be the failure of any other person who may have agreed to furnish the contractor with machinery, teams, or material to be used in the work required by the contract. His liability arises out of no agreement, express or implied, between him in his individual character and the street contractor."[6]

§ 172. **Same—Cannot Arise by Estoppel.**—The doctrine of estoppel cannot be applied against an owner in favor of a contractor who has not completed his work on time—in other words, there cannot be a valid extension by estoppel. "This is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and to such proceedings the doctrine of estoppel in pais has no application. If there is no lien, there can be no recovery. The lot alone is liable, and if there was no lien at the time it is claimed a waiver was made, we do not see how any could have been created by the oral statements of the defendant."[7] There can be no estoppel against the city, in a proceeding to improve an accepted street, because of the granting of an invalid extension.[8]

§ 173. **Same—Not by Injunction at Suit of Third Party.** The issuance of an injunction at the suit of a third party does not extend the time for completion; and if the contractor allows the time to expire without obtaining an extension, he must suffer the loss.[9] By section 1511 of the Civil Code,

[6] Heft v. Payne, 97 Cal. 108, 31 Pac. 844.

[7] Heft v. Payne, 97 Cal. 108, 31 Pac. 844.

[8] Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22.

[9] Union Contracting etc. Co. v. Campbell, 2 Cal. App. 534, 84 Pac. 305.

delay is excusable only when performance "is prevented or delayed by the act of the creditor, or by the operation of law." An injunction sued out by a third person is not a prevention of performance by operation of law. The courts say "it is an act of an individual and not of the government. The obligor contracts that he can and will control the acts of third persons so far as necessary to enable him to perform his contract. It is not the law operating upon the facts which creates the difficulty, but the use of a judicial writ by a private litigant." [10]

§ 174. Rights of City When Work not Completed in Time.—By the terms of section 5, if "the owner or contractor, who may have taken any contract, do not complete the same within the time limited in the contract, or within such further time as the council may give them, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance." It is probable that this provision does nothing more than express what would be understood in its absence. In an early case, interpreting a statute which did not contain this provision, the court said: "This order [the resolution ordering the work] was in the nature of a judgment. The subsequent steps were ministerial in their character. They were taken for the purpose of carrying the order into execution. The failure of the contractor to perform his contract could not on any known principle affect the validity nor impair the efficiency of the order. If the contract had been kept, the order would have been functus officio; but as it was not kept, the requirement that the 'work should be done' stood unexecuted, and was as mandatory as ever. A neglect or refusal of a party to execute a decree in chancery does not vitiate the

[10] Union Contracting etc. Co. v. Campbell, 2 Cal. App. 534, 84 Pac. 305, quoting from Klauber v. San Diego St. Car Co., 95 Cal. 353, 30 Pac. 555.

decree, nor does a return of nulla bona, on an execution at law, drive the creditor to a new action. As the failure of a first attempt to execute a judgment does not preclude the suitor from trying again, so it may be said generally that powers, whether conferred upon individuals or boards, do not fail, for the reason that the first effort to execute them was defeated by the wrongdoing of third persons. The argument on the part of the respondent is, that to relet on the basis of the order after a failure of the contractor would be contrary to the *process* marked out by the statute for doing street work. This we conceive to be a mistake. The work having been ordered, the process of doing it was by contract. When the contract failed by the bad faith of the man who made it, the case stood as it would if no contract had ever been made, and the statute process could be repeated upon the unexecuted order. The argument of the respondent, if pushed to its consequences, would show that by the failure of a contractor the board would lose all power to deal with the subject matter, whether de novo or otherwise. The power of the board is commensurate with the exigencies of the order, and while the order remains unexecuted the power of the board and superintendent, with respect to it, cannot be considered as exhausted. The circumstance that there are two instances named in the sixth section in which the board is expressly authorized to relet upon the order—viz., where the lowest bidder fails to enter into a contract within fifteen days, and where the owners who may have taken the contract do not complete the same within the time limited—does not argue that the board cannot relet where the statute process breaks down by the default of the lowest bidder after he has taken on the character of 'contractor.' We consider, in this instance, that the statement of the two cases referred to are by way of example, and not as excluding other cases of similar nature."[11]

[11] Dougherty v. Foley, 32 Cal. 402. See, also, Himmelmann v. Oliver, 34 Cal. 246; Meuser v. Risdon, 36 Cal. 239.

§ 175. Effect of Charter Provision Forbidding City Officers to be Interested in Contracts.—The Municipal Corporations Act and many of the charters contain a provision that no officer of the city "shall be interested in any contract to which the city is a party, and any contract contrary to the provisions thereof shall be void." It is held that such a provision is applicable to a street improvement contract; and that if the contractor is an officer of the city, the contract is void. This being so, of course no recovery can be had in an action to foreclose the lien of the assessment.[12] The fact that the Vrooman Act permits of property owners' contracts does not nullify this provision. At most, it merely makes an exception to the general rule in favor of property owners.[13] It is not necessary for the owner to file a petition of remonstrance where a contract is improperly awarded. The council has no jurisdiction to award the contract to a city official. The provision authorizing a petition of remonstrance was intended to be applicable only to acts and proceedings within the power of the council.[14]

§ 176. Effect of Agreement for Rebate to Certain Owners. The courts have in several cases been called upon to decide the effect of a side agreement between the contractor and some of the owners, whereby certain owners are given a re-

12 Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431.

13 Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431.

14 In Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431, the court said: "The construction of the provision for petition of remonstrance, contended for by counsel for respondent, would necessarily result in nullifying all limitations of the power of the council in regard to contracts for street work. If, in cases of this kind, the lot owners have no other remedy than by petition of remonstrance, and the decision of the council upon such petition is final and conclusive, it surely follows that the council have power to award all street contracts to its own members, and then upon this coram nobis process, to conclusively affirm its own award. The possibility of such a result could not have been contemplated or intended by the legislature; nor would it follow from a proper application of the provision of the code."

bate or a cheaper price in consideration of not consenting to a property owners' contract. The earlier cases held such an agreement a fraud upon the method devised by the legislature for street work; although it was not a fraud upon a party to the contract.[15] Under some of these cases, however, it was held that the owner's only remedy was by appeal to the council.[16] A recent case has held that such a contract is not fraudulent when all the owners are allowed to share in the benefits of the agreement.[17] A dictum in the case goes even further. The court said: "If there was fraud in the contract, it must be judged alone from its terms. The award had already been made, and alleged fraudulent combination

[15] Nolan v. Reese, 32 Cal. 484.

[16] Nolan v. Reese, 32 Cal. 484; Himmelmann v. Hoadley, 44 Cal. 213, 227. And see Chambers v. Satterlee, 40 Cal. 513, citing Nolan v. Reese. In Nolan v. Reese, supra, the court said: "But under the provisions of the act of 1862, we are cut off from subjecting the rights of the plaintiff to the test of those principles. Should the fraud with which the contractor was charged be considered as affecting the 'award of the work' to him by the board of supervisors (sec. 6), then under the fourth section of the act it should have been brought to the notice of the board of supervisors by a remonstrance coming from one or more of the lot owners. If, on the other hand, the fraud is considered as affecting the 'legality of the assessment,' then any person having objections to make should have appealed to the board of supervisors within thirty-five days subsequent to the date of the assessment. (Sec. 12.) Such are the methods pointed out by the act for reviewing the decisions of the board and the acts of the superintendent, and they exclude all others by positive provision. (Secs. 4 and 6; Conlin v. Seamen, 22 Cal. 549.) The reason for this narrowness in the remedies provided for by the act is found in the fact that the legislature, in framing it, was providing for a matter of public concern through an exercise of the sovereign power of taxation. The meagerness adverted to has its origin in the necessities of the power."

Under a statute authorizing the owner, in an action to foreclose the lien of a street assessment, to set up "fraud in the assessment, or in any of the acts or proceedings prior thereto," it was held that such a fraudulent agreement was a perfect defense: Brady v. Bartlett, 56 Cal. 350.

[17] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

between the lot owners and the contractors could not have influenced the council in making the award. By the act of 1891 three-fourths of the property owners might elect within ten days after notice of the award to do the work at the price awarded. But if, instead of making the contract complained of, they had elected to do the work, the assessment upon the property would have been no less. . We fail to see how the other property owners were injured, especially as they had an opportunity to avail themselves of the contract." This case was followed in a later case, where it was held that fraud without injury gives no right of action.[18] It is still an open question as to whether any relief would be awarded where injury could be shown.[19]

§ 177. Contract cannot be Modified After Execution.— Neither the council, the street superintendent, nor the contractor, nor all of them, has or have the power to modify the contract in any material respect. The character and extent of the work are determined by the resolution of intention and the specifications. The amount to be paid is determined by the resolution of award. Certainly no change can be made which will change the character or amount of the work,

18 Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

19 In Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661, the court said: "It is a well-settled principle that fraud without injury gives no right of action, and it is clearly applicable to cases of this sort. It is not alleged that the plaintiffs, if they had succeeded in combining with other property owners to take the contract and perform the work, could have completed it at less expense than the contract price. Under the law the contract must have been let to such owners at the same price at which it was let to the contractors. The price being the same, the assessment must therefore have been the same, and it follows that the owners taking the contract could gain no benefit therefrom unless there was a profit in doing the work at that price. There is neither allegation or claim that there would have been any profit. Moreover, it is not averred that either of the plaintiffs desired to take the contract, or that either of them would have done so had the opportunity been afforded, or that they made any effort in that direction."

for that is beyond the jurisdiction of the council.[20] And it would seem equally clear that no change is authorized in regard to payments, for such a change would amount to the execution of a new contract without the formalities required by law. Of course, where for any reason a contract is invalid, the council may treat it as if it did not exist and, after proper proceedings, enter into a new contract.[21] And it may abandon the contract with the consent of the contractor, pass a new resolution of intention, and award the contract to the original contractor at an increased price.[22] The presumption of regularity which attaches to proceeds of a legislative body operates in favor of the fairness of the new contract.

§ 178. Void Contract cannot be Made Valid by Ratification.—A contract, void because of defective proceedings or of some defect inherent in itself, cannot be made valid by subsequent ratification by the council. "Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any person than such lowest bidder—cannot

20 Warren v. Chandos, 115 Cal. 382, 47 Pac. 132.

21 See Spaulding v. San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249.

22 Spaulding v. San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249.

be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. . . . . A ratification can only be made when the principal possesses at the time the power to do the act ratified."[23]

§ 179. **City not Liable on Void Contract.**—While the statute does not expressly so provide, the city is not liable, to any extent, for work done upon an unauthorized contract.[24] This rule applies although the contractor has fully completed the work, and both the city and the property have received the full benefit. "Cities are creatures of law, and their powers are defined by law, and persons dealing with them are chargeable with notice, not only of the extent of their powers, but also of the mode in which their powers may be exercised."[25] There is no guaranty on the part of the city that the forms of law have been complied with because its officers, without authority, attempt to contract.[1] There is not even a moral obligation to pay. Hence, an agreement upon the part of the city, evidenced by a resolution of the council or otherwise, made after the work has been per-

[23] Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. This case contains an excellent discussion of the subject of ratification.

[24] Some of the cases refer to the fact that the contract contains a provision that the city shall not be liable as showing that the city is not liable. This could be so only upon the theory that the contract is not entirely unauthorized—that while it may not be authorized by the Vrooman Act, it may be otherwise under some other provision. Manifestly, this is untenable. One provision in a void contract—which is really not a contract at all, but merely a form—can have no more effect than the other provisions.

[25] McBean v. City of San Bernardino, 96 Cal. 183, 31 Pac. 49. See, also, Connolly v. City and County of San Francisco (Cal.), 33 Pac. 1109. Compare Raisch v. City and County of San Francisco, 80 Cal. 7, 22 Pac. 22.

[1] Daly v. City and County of San Francisco, 72 Cal. 154, 13 Pac. 321. See, also, Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; In re Market Street, 49 Cal. 546. Compare Argenti v. City of San Francisco, 16 Cal. 255, an early case in which, under different circumstances, the city was held liable.

formed, is without consideration, and no recovery can be had thereon.[2] And of course a subsequent assessment for work done under an abortive contract is void.[3]

§ 180. Assignment of Contract—By Original Contractor. The contractor may assign his contract before the commencement of the work, and the assignee may do the work and collect the assessment.[4] A street contract is not one requiring any particular skill; and hence does not fall within that class of contracts which in their very nature are nonassignable.[5] Nor is it rendered nonassignable by section 1457 of

[2] "The contract under which the assignor of plaintiff constructed this sewer, referred to in the complaint, contemplated no liability on the part of the city, but that the work should be paid for by an assessment upon adjacent property; and it cannot be said that the city was under any obligation whatever to pay for that which not only the law, but the contract of plaintiff's assignor, following the law, expressly provided that it should not be responsible for": McBean v. City of San Bernardino, 96 Cal. 183, 31 Pac. 49. Compare Creighton v. City and County of San Francisco, 42 Cal. 447.

[3] In re Market Street, 49 Cal. 546.

[4] Taylor v. Palmer, 31 Cal. 241; Hendrick v. Crowley, 31 Cal. 472; Himmelmann v. Reay, 38 Cal. 163; Callender v. Patterson, 66 Cal. 356, 5 Pac. 610; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Warren v. Russell, 129 Cal. 381, 62 Pac. 75; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278.

[5] In Taylor v. Palmer, 31 Cal. 241, the court said: "Aside from the discretion vested in the board of supervisors to reject all bids when they deem it for the public good, or the bid of any party who may have proved delinquent or unfaithful in any previous contract with the city, there is no restriction upon the capacity of the contractor. He is not expected nor required to perform the work in person. Were it so, street improvements in San Francisco would make slow progress. Whether he knows anything about road-making, or can tell the difference between a mud turnpike and a Nicolson pavement, or whether a sewer should be constructed in the shape of a longitudinal section of an eggshell, or which end of the section should be uppermost, is of no consequence, for the contract is not awarded to him because of his supposed knowledge or skill, but because his bid is the lowest and his bond for the performance of the work in a workmanlike manner and according to the specifications

the Civil Code, which reads as follows: "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as provided by section 1466." The Supreme Court has said that "it is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party thereto from his obligations without the consent of the creditor."[6] Hence it is not necessary to the validity of the assignment that the consent of the city be obtained.[7] The assignee is not bound by any agreement made by the original contractor as to the mode of payment, unless he has notice thereof; and consequently such an agreement cannot be pleaded as a setoff in an action by the assignee to foreclose the lien.[8] An assign-

is good. All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned. But rare genius and extraordinary skill are not indispensable to the workmanlike digging down of a sand-hill or the filling up of a depression to a given level, or the construction of brick sewers with manholes and covers, and contracts for such work are not personal, and may be assigned. But independent of the foregoing considerations, the form of the warrant given by the superintendent, as prescribed in the statute, recognizes the assignable quality of these contracts, and the statute nowhere gives color to the suggestion of counsel that the recognition is confined to assignments made after the work has been performed. Finally, by the terms of the statute and the contract, the work is to be performed under the direction and to the satisfaction of the superintendent of public streets and highways. It is his genius and skill, therefore, which gives form and excellence of performance to the work, and it is, therefore, in his genius and skill, if anywhere, that trust and confidence are reposed."

6 Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266.

7 Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266.

8 Himmelmann v. Reay, 38 Cal. 163. This holding is contrary to the general rule as to the rights of assignees. It is held, except in cases of negotiable instruments and in cases affected by the recording acts, that the assignee takes subject to all equities which exist against the assignor. Hence, if this case must rest upon a mere contractual relation, it is clearly wrong and should not be followed.

ment may be made at any stage of the proceedings subsequent to the execution of the contract. Hence, after the work is done the contractor may assign his lien to a person who will be authorized to collect it.[9] Evidence that the assignment was executed by the manager of a contracting corporation, who was in the habit of executing assignments and contracts on behalf of the corporation, with the knowledge and acquiescence of the board of directors, is sufficient to prove authority.[10]

§ 181. **Same—By Property Owners.**—The same principles apply to a property owners' contract. The owner may assign the contract to an assignee, who may do the work and collect the assessment. It has been argued that inasmuch as an owner cannot sue himself, the assignee cannot foreclose a lien upon the property of one who was a party to the contract. The answer to this is that he sues upon the assessment and not upon the contract. "Independent of the statute, the tax would be due from the taxpayer to the city, and the city would have to demand and sue for it if necessary; but the statute provides that the city shall not be responsible for the collection of the tax or subjected to the risk, trouble and annoyance, but shall virtually assign her right of action for the tax to the contractor in full payment for his work and labor under her contract with him, and authorize him to sue in his own name to recover it, if necessary. This being done, his relation of contractor is at an end. He has performed his contract to the satisfaction of the city, which is the other contracting party, and has got what he agreed to take for his work. If he sues, he does not sue upon his contract with the city, but upon the draft,

It can be supported, if at all, only upon the theory that the assessment is not a matter of contractual liability. The nature of assignments is more fully discussed in the next section.

[9] See Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Himmelmann v. Reay, 38 Cal. 163; Cochran v. Collins, 29 Cal. 129.

[10] Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

in the shape of a warrant issued by the superintendent of streets, as agent of the city, given to him by the city, upon her taxpayers, who are indebted to her for the amount therein specified. The thing sued for is not the contract price or a part of it, but the tax specified in the assessment or warrant, for which he sues not as contractor or as assignee of somebody else who was the contractor, but as assignee of the city, and he is compelled to make the same averments and the same proof which the city would have had to make had she undertaken to collect the tax; in other words, he has to show that the entire proceedings which terminated in imposing upon the property holder a liability to pay the tax in suit have been in conformity with the provisions of the statute by which the tax was authorized. Without doing this the city could not have recovered under the more ordinary mode adopted in such cases, nor can he." [11] The assignment of the contract before the work is done does not estop the owners from attacking the validity of the proceedings. Such an assignment does not amount to a warranty that the proceedings are valid. All the proceedings are of record, and the contractor must determine their validity at his peril.[12] Where, however, the work has been completed,

11 Hendrick v. Crowley, 31 Cal. 472.

12 In Union Pav. & Contracting Co. v. McGovern, 127 Cal. 638, 60 Pac. 169, the court said: "Callender v. Patterson, 66 Cal. 356, 5 Pac. 610, cited by appellant, is inapplicable. In that case the property owners had entered into the contract and completed the work, and received an assessment therefor which purported to be a charge upon their lands, and more than a year thereafter they assigned the same to the plaintiff 'for value.' It was upon these facts that the court held them to be estopped from questioning the validity of the assessment. In the agreement between Tucker and the property owners they do not purport to assign to him an assessment for work that had been already done for them, or any existing obligation in their favor from which a warranty of its validity might be implied. They merely agreed to assign a contract not yet entered into, and which at that time, and also at the time of its assignment, was wholly executory, and Tucker must be assumed to have determined the value and validity thereof for himself. The contract which was the subject of their negotiations was of a public nature, and all the

a warranty of the validity of the assessment may be implied; and accordingly the owners are estopped to deny the validity.[13]

§ 182. **Right to Abandon Proceedings.**—It would seem that the council may abandon the proceedings at any stage where such action will not constitute a violation of contract. In an early case, interpreting an early statute which provided for a preliminary petition by the property owners and a sharing of the expense by the owners and the city, it was held that the city could not, after commencing proceedings, abandon them. A contract relation was said to be created between the property owners and the city by the city's consent to the proceedings.[14] There seems to be no such contract relation under the Vrooman Act. The act assumes a right to abandon, for in section 5 it provides: "And in case the work is abandoned by the city before the letting of the contract, the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury."[15] After the award, however, and while the contractor is not in

proceedings in reference thereto were evidenced by public records open to the inspection of all, and from which Tucker had the same opportunity for ascertaining the validity of the contract as did the defendants. The court finds that the defendants made no representation of any kind to Tucker or to the plaintiff to the effect that the contract, or that the proceedings therefor were regular or sufficient or valid, and it also finds that they did not themselves know of any defect in said proceedings until after the commencement of this suit."

[13] Callender v. Patterson, 66 Cal. 356, 5 Pac. 610. Compare Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759.

[14] Lucas v. City of San Francisco, 7 Cal. 463.

[15] In Warren v. Chandos, 115 Cal. 382, 47 Pac. 132, the court said: "The board of supervisors is the legislative body of the city and is vested with a supervisory power over all improvements of streets and contracts therefor; and in the exercise of its legislative discretion and consideration for the public welfare, it may, at any time, rescind a previous order for the improvement of a street."

Compare Spaulding v. San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249.

default, there is clearly no right to abandon. There is a contractual relation created by the award, which the city cannot repudiate. It is made the positive duty of the superintendent of streets to enter into a contract, after the expiration of the time limited, except in cases where the property owners take the work; and if he fails or refuses to do so, the contractor may compel him by mandamus.[16] And it would seem to follow that when the property owners fail in their contract, the superintendent may be compelled to enter into a contract with the original contractor. The first contract, as we have already seen, is a contract to enter into a contract upon certain conditions. Upon the happening of those conditions the right becomes absolute; and the council cannot impair it by rescinding the proceedings.

§ 183. **Requirements for Private Contracts.** — By an amendment of 1911, the following provision was inserted in section 5: "All contracts entered into between the owners of any property and the contractor or his agents to perform the work of improvement on any street, alley, lane, avenue, place or court, shall be in triplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the city, one copy thereof shall be held by the contractor or his agent, and one copy thereof duplicate shall be held by the owners." Evidently this is intended to apply to private contracts for street work, for otherwise it has no meaning. In any event, it does not properly belong in this section.

16 Genilla v. Hanley, 6 Cal. App. 614, 92 Pac. 752.

DIVISION 3.

RULES FOR APPORTIONMENT OF THE BURDEN.

§ 184. In general.
§ 185. Burden must be uniform—Effect of failure to assess lot liable.
§ 186. Same—Assessment of public property.
§ 187. Same—Assessment of railroad right of way.
§ 188. Assessment must not include work for which railroad is liable.
§ 189. Assessment for work in front of blocks.
§ 190. Shape of lots is immaterial.
§ 191. Assessment for work on main street crossings.
§ 192. Same—Constitutionality.
§ 193. Assessment for work on termination of main street in another main street.
§ 194. Assessment for work on crossing of alley or subdivision street with main street.
§ 195. Assessment for work on alley or subdivision street crossings.
§ 196. Assessment for work on termination of alley or subdivision street in main street.
§ 197. Assessments on both sides of street—Meaning of "fronting thereon."
§ 198. Same—Exception where part already done.
§ 199. Same—Same—Effect on crossing assessments.
§ 200. Provision that work shall be excepted is mandatory.
§ 201. Credit for grading done by owner.
§ 202. District assessments.

§ 184. In General.—Section 7 prescribes the rules for the apportionment of burdens. Two distinct methods are provided—one, the so-called front-foot rule, an assessment being levied upon property according to its frontage; the other, the district plan, the assessment being levied upon the property within a district fixed by the council according to the supposed benefit derived from the improvement. The constitutionality of the front-foot rule has been attacked in numerous cases, the argument being that it is an arbitrary apportionment of burdens without respect to benefits. The courts have uniformly held that such an apportionment is proper and legal, and does not deprive an owner of his prop-

erty, without due process of law.[1] The constitutionality of the district plan of assessment has also been attacked, but it is clearly a legal method of apportionment, and the courts have so held. Subdivision 1 of this section lays down the front-foot rule for work done in front of blocks.

§ 185. Burden must be Uniform—Effect of Failure to Assess Lot Liable.—It is a general principle applicable to all taxation that the burden must be uniform. "Assessments may be apportioned by reference to the number of feet fronting on the improvement, or to any other standard which will approximate exact equality and uniformity; but whatever the basis of taxation, the requirement that it shall be uniform is universal, the difference being only in the character of the uniformity."[2] For this reason, it is held that the improper omission of a lot within the district designated by the statute or by the council makes an assessment void;[3] and where this appears on the face of the proceedings, an appeal to the council is unnecessary. "If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those liable to pay it, and have still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control."[4] The mere omission of a lot fronting upon the improvement does not always make an assessment void on its face. The council is authorized to except certain work already done, and where the resolutions provide for this, the omission of a lot may be presumed to be because the super-

[1] The question of constitutionality is fully discussed, ante, secs. 6–14.

[2] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677.

[3] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Dyer v. Harrison, 63 Cal. 447; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 (under Street Opening Act). See, also, Moulton v. Parks, 64 Cal. 166, 30 Pac. 613.

[4] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677.

intendent has decided that the work was already done to his satisfaction at the time of the commencement of the proceedings.[5] In such a case, the only remedy is an appeal to the council. It is to be noted that if all the lots are assessed the fact that some are assessed less than others does not violate the principle of uniformity. The council, upon appeal, is vested with jurisdiction to correct erroneous apportionments. The principle of uniformity does not require, when the work is done upon the district plan, that all lots fronting on the improvement shall be assessed. It may be that some lots will be injured more than benefited. The council has jurisdiction to determine what property is benefited; and in the exercise of this, it may create a district excluding certain of the lots fronting on the improvement.[6]

§ 186. **Same—Assessment of Public Property.**—The doctrine of uniformity does not require that public property be assessed.[7] It is conceded that a tax for general purposes cannot be levied on such property. "The rule of equality and uniformity cannot be more stringent in respect to local than to general taxation, and if it has no application in the latter case to the property of the sovereign, it can have none in the former."[8] In 1911 subdivision 8 of section 7 was amended to read as follows:

"Whenever any lot, piece or parcel of land belonging to the United States or to the state of California, or any lot, piece or parcel of land belonging to any county, city, public agent, mandatory of the government, school board, educational, penal or reform institution or institution for the

5 Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71.

6 Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53.

7 People v. Austin, 47 Cal. 353.

8 People v. Austin, 47 Cal. 353. To the effect that public property is, in general, exempt from street assessments, see ante, sec. 22.

feeble minded or the insane, and being in use in the performance of any public function, fronts upon the proposed work or improvement or is included within the district declared by the city council in the resolution of intention to be the district to be assessed to pay the costs and expenses thereof, the city council may, in its discretion, in the resolution of intention, declare that said lots, pieces or parcels of land so owned and in use, or any of them, shall be omitted from the assessment to be made to cover the costs and expenses of said work or improvement. In the event that said lots, pieces or parcels of land, or any of them, shall, by said resolution be omitted from the assessment then the total expense of all work done shall be assessed on the remaining lots fronting on the work or improvement or lying within the limits of the assessment district without regard to such omitted lots, pieces or parcels of land. In the event the city council shall, in its resolution of intention, declare that the said lots, pieces or parcels of land so owned and in use, or any of them, shall be included in the assessment, or in the event that no declaration is made respecting such lots, pieces or parcels of land, then such sum or sums as thereafter may be assessed against such lots, pieces or parcels of land, so owned and used, shall be payable by the city out of the general fund, unless the council shall in its resolution of intention designate another fund and the contract for said work or improvement thereafter made shall contain a provision to that effect."

It will be noted that this recognizes the right of the city to assess the cost of work in front of public property upon the owner of private property. It should also be noted that this purports to exempt only such state property as is actually devoted to public use.[9]

§ 187. Same—Assessment of Railroad Right of Way.—The doctrine of uniformity does not require that a railroad

[9] In an earlier chapter we have discussed the liability of public property not devoted to public use. See ante, sec. 22.

right of way be assessed; and prior to 1911, it was held that, owing to the fact that it was not made liable expressly, it could not be assessed. "The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged, in the hands of the company, with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road, in forced sale upon legal process, or for an assessment."[10]

In 1911, section 7 was amended to read in part as follows: "Subdivision Eleven.—The term lot, lots, lands, piece or parcel of land whenever mentioned in this act shall be deemed to include property owned or controlled by any person, firm or corporation as a railroad, street or interurban railroad, right of way, and whenever a railroad, street or interurban railroad right of way shall front or abut on any street improved under the provisions of this act or shall be included within any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessments, and diagram and shall be assessed in the same manner and with the same effect as other lots, lands, or pieces or parcels of land are assessed as provided in this act and such railroad right of way shall be subject to sale for nonpayment of assessments as in this act provided."

The effect of the amendment is to make a right of way subject to assessment.

[10] Southern Cal. Ry. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 2 Ann. Cas. 583, quoting from Chicago etc. Ry. Co. v. City of Milwaukee, 89 Wis. 509, 62 N. W. 417, 28 L. R. A. 249. See, also, Fox v. Workman, 155 Cal. 201, 100 Pac. 246.

§ 188. Assessment must not Include Work for Which Railroad is Liable.—The assessment "shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon." We have already seen that it is competent for the council, in its resolution of intention, to except such work.[11] Where it does not except it, however, the cost cannot be charged upon the abutting owners; nor could it, under the Vrooman Act, prior to 1911, be charged against the railroad company.[12] The mere fact, however, that a portion of the street is occupied by a railroad company, whose duty it is to improve or keep in repair a part of the street, does not impair the prima facie correctness of the assessment. It will be presumed that the superintendent of streets has done his duty and has excluded such work from the assessment.[13] If the owners are aggrieved, their remedy is by appeal to the council. Where the railroad company, in its charter, has agreed that when any street is to be improved, its portion of the work shall be let together with the rest of the street, and the company shall be held for the payment of the cost, it is bound by its agreement. The payment may be enforced by the contractor by suit in his own name.[14] A procedure to compel railroad companies to fulfill their obligation to make improvements was provided by an amendment to this act in 1911, and is discussed later.[15]

§ 189. Assessment for Work in Front of Blocks.—Except where the work is done under the district plan, assessments for work done in front of blocks must be levied by the front-foot method, "each lot or portion of lot being separately assessed, in proportion to the frontage, at a rate per front

11 See ante, sec. 81.

12 McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

13 McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885.

14 Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

15 See post, sec. 342ff.

foot sufficient to cover the total expense of the work." It is to be noted that the assessment is for the entire work in front of blocks.[16] An owner is not assessed for the particular work in front of his property. The total amount is divided among the owners in proportion to their frontage. In many cases the result is the same as an assessment upon each owner for the work in front of his own land; but in other cases, especially in grading, it frequently happens that more work is required in front of certain lots, and yet the total expense must be divided equally.

§ 190. **Shape of Lots is Immaterial.**—"The statute does not specify the depth to which the lands fronting on the work shall be assessed, or the shape or boundaries of such lots, its language being that the expense shall be assessed upon the lots and lands fronting thereon, 'each lot' being separately assessed 'in proportion to its frontage.' The basis of the assessment is the frontage upon the work, and the frontage of each lot determines the amount of the assessment against that lot, irrespective of its shape, size, or depth. There is no requirement that the lots to be assessed shall be rectangular with the street on which they front, nor can this direction for the assessment impair the owner's right to dispose of his lands as he may desire. If the superintendent does not properly delineate an owner's lot upon the diagram, or includes with it property which should be included in another lot, his act can be corrected on an appeal to the supervisors; but an owner cannot be said to be 'aggrieved' merely because the superintendent, while correctly giving the frontage of his lot and assessing the proper amount thereto, has incorrectly delineated its interior lines, since the amount of the assessment is in no wise affected thereby."[17]

[16] See San Diego Inv. Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082; Millsap v. Balfour, 154 Cal. 303, 97 Pac. 668.

[17] Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283. See, also, Martin v. Wagner, 120 Cal. 623, 53 Pac. 167, holding a triangular-shaped lot liable.

§ 191. Assessment for Work on Main Street Crossings.—Subdivision 2 of section 7 provides for separate assessment districts for work done on main street crossings.[18] Such work "shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks." This section is clear as to the property to be charged. It is to be noted, however, that in determining the quarter blocks regard must be had only to main streets. A subdivision street is not to be considered in determining the property to be charged.[19] It is further to be noted that the assessment is to be only upon property having a frontage within the district, irrespective of depth.[20] Where a portion of the frontage of a lot is within the district and a portion outside, the assessment can be levied only upon the portion within the district. In such a case the dia-

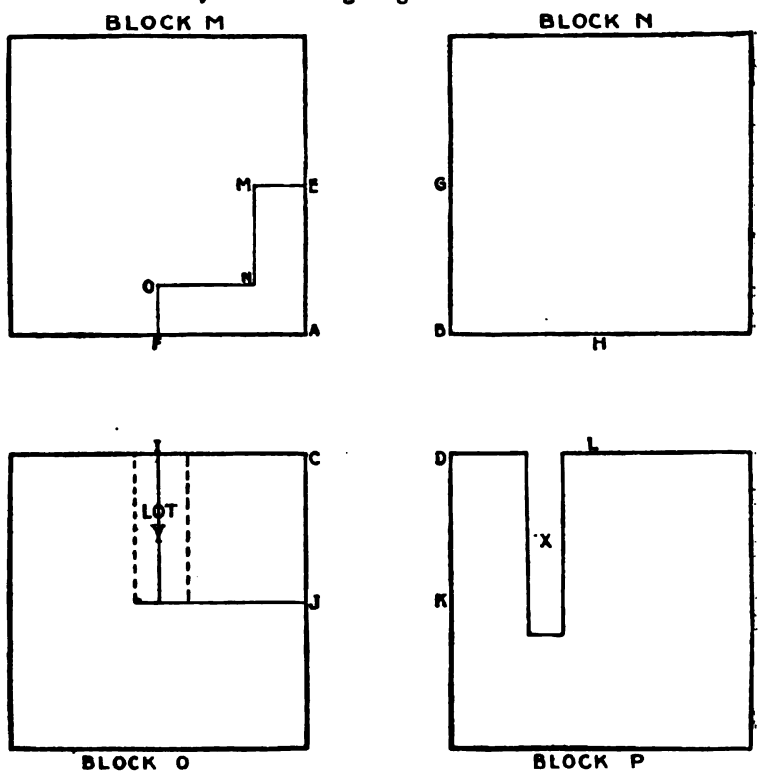
18 Dyer v. Harrison, 63 Cal. 447.

19 See Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034. Property fronting on such a subdivision street cannot be made liable for any portion of the expense of such crossings: Id.

20 This principle is laid down, in regard to assessments for work done in front of property in Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283. It is clearly applicable here. From this, it will be seen that a "quarter block" does not mean the actual quarter of the block, but only so much thereof as has a frontage on the street. See, also, Martin v. Wagner, 120 Cal. 623, 53 Pac. 167, holding a triangular-shaped lot liable.

gram should show what portion is assessed.[21] The proportion to be borne by each lot is that which its frontage upon the streets within the district bears to the total frontage within the district.

21 Parker v. Reay, 76 Cal. 103, 18 Pac. 124. The rules stated will be made clearer by the following diagram:



For the work done on the crossing, a b c d, property fronting on the quarter blocks, a e, a f, b g, b h, c i, c j, d k, d l, is liable. In Block M, the property fronting on these streets is a e m n o f. It will be observed that this is not an entire quarter block. In Block P, it will be observed that the subdivision street is not considered in determining the quarter block. The frontage on the subdivision street, x, is not liable for any part of the work on the crossing, a b c d: Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034. In Block O, only that portion of Lot Y is chargeable which has a frontage between c and i.

§ 192. **Same—Constitutionality.**—The fact that an assessment for work on crossings results in a heavier burden on corner lots does not render the provision unconstitutional. The Supreme Court, in a recent case, said: "There is neither inequality nor injustice in this. The result is, no doubt, to put a heavier burden upon corner lots than upon inside lots. But the burden is merely proportionate to the benefit resulting from the improvement. The legislature has, in effect, declared that the improvement of the crossing of two streets benefits the property fronting on each of such streets for one-half of the distance from the intersection to the next main street. There is thus created an assessment district, and every lot within this district is assessed in proportion to its frontage. A corner lot pays more because it is doubly benefited. The crossing may reasonably be regarded as a part of each of the intersecting streets. Its improvement is a benefit to the land fronting on each. The owner of the corner lot is, therefore, deprived of no constitutional right when the legislature provides that his property shall be assessed according to its combined frontage on the two streets."[22]

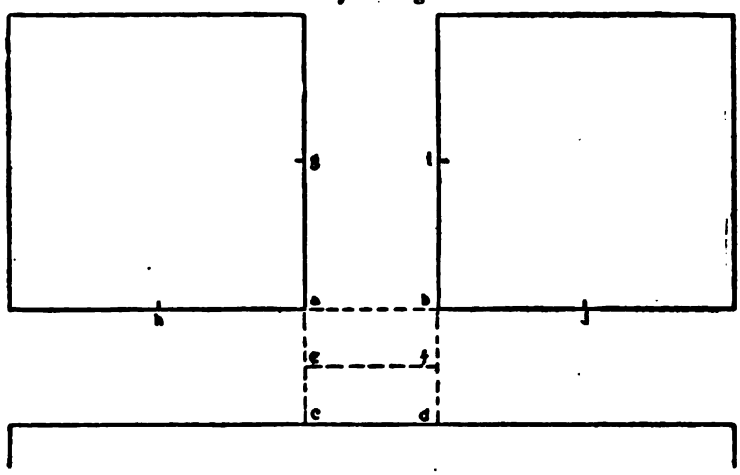
§ 193. **Assessment for Work on Termination of Main Street in Another Main Street.**—Subdivision 3 provides: "Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main streets, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination." It is to be noted that this does not say one-half the whole expense is to be charged upon the quarter blocks, but that the expense of the work on one-half of the width opposite the termination is to be so

22 Ross v. Barber Asphalt Pav. Co., 158 Cal. 37, 109 Pac. 883.

charged. In this respect this provision differs from assessments for crossings. This would seem to require separate apportionments; and the assessment should show for what part of the work it is made.[23] The statute is vague as to what is meant by "one-half of the width of the street opposite the termination." It seems to be generally conceded, however, that the expense of the half nearest the quarter blocks is to be assessed upon their frontage, and the expense of the other half upon the lots fronting on the termination. Any other construction would require arbitrary action. It frequently happens, especially in cases of grading, that the cost of one-half is greater than that of the other half. This provision is also uncertain as to what is meant by "lots fronting on the latter half of the street at such termination." Where the intersecting streets are at right angles, there can be but one solution. Where, however, the

[23] See Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772.

These rules are made clearer by a diagram.



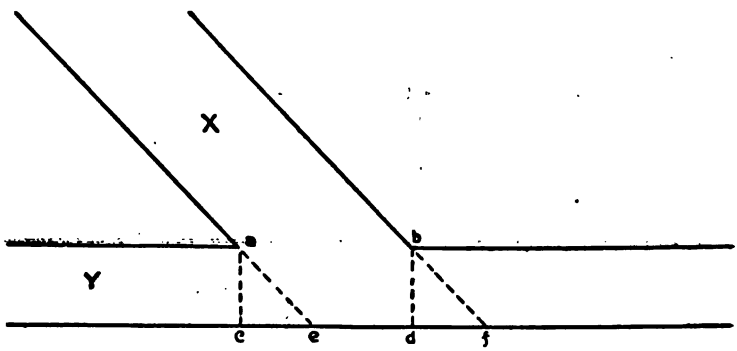
For work done on the portion marked a b e f, property fronting on a g, a h, b i, b j is liable. For work done upon c d e f, property fronting on c d is liable.

In general, see Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699.

streets are not at right angles, the question is more difficult. In such a case, it is my opinion that the statute requires that lines be drawn at right angles to the nonterminating street from the points where the terminating street lines first intersect, and that these lines, extended to the opposite side of the nonterminating street mark the bounds.[24] In other words, I am of the opinion that "termination" means the line where the streets meet. While another interpretation is possible, this seems the more reasonable, and the one which will avoid more difficulties.

§ 194. Assessment for Work on Crossing of Alley or Subdivision Street With Main Street.—Subdivision 4 provides: "Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another." It will be noted that this rule dif-

[24] The following diagram will illustrate my meaning:



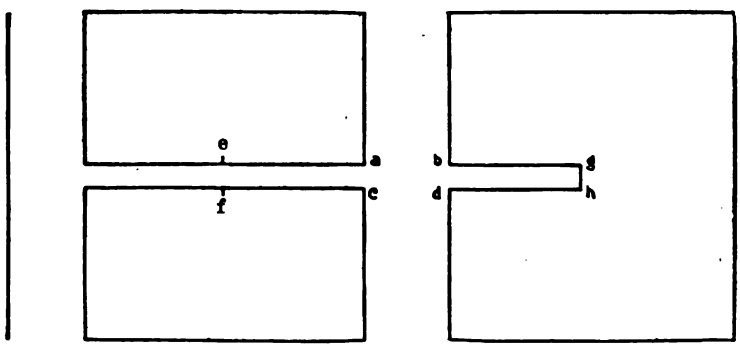
I am of the opinion that a b is the termination of X street, and that the property fronting on c d is the property intended to pay for one-half the rectangle a b c d. It is possible to interpret termination as meaning e f. Such an interpretation, however, opens up numerous difficulties.

As to the liability of a triangular-shaped lot for such work, see Martin v. Wagner, 120 Cal. 623, 53 Pac. 167.

fers radically from the rule for crossings of main streets. All of the cost here is to be assessed upon lots on the alley or subdivision street, the lots on the main street paying no portion thereof.[25] The theory seems to be that the alley constitutes a lot fronting on the improvement, that those owning property fronting on the alley are the ones having a particular interest therein, and that therefore they should be the ones to pay the expense. The same theory seems to hold in subdivision 6. This theory, however, is merely an explanation of the action of the legislature. It does not apply where the alley is within a quarter block liable to assessment for main street crossings, so as to make the frontage on the alley liable for any part of such main street crossing.[1]

§ 195. Assessment for Work on Alley or Subdivision Street Crossings.—Subdivision 5 provides: "The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to

25 The following diagram illustrates the rule:



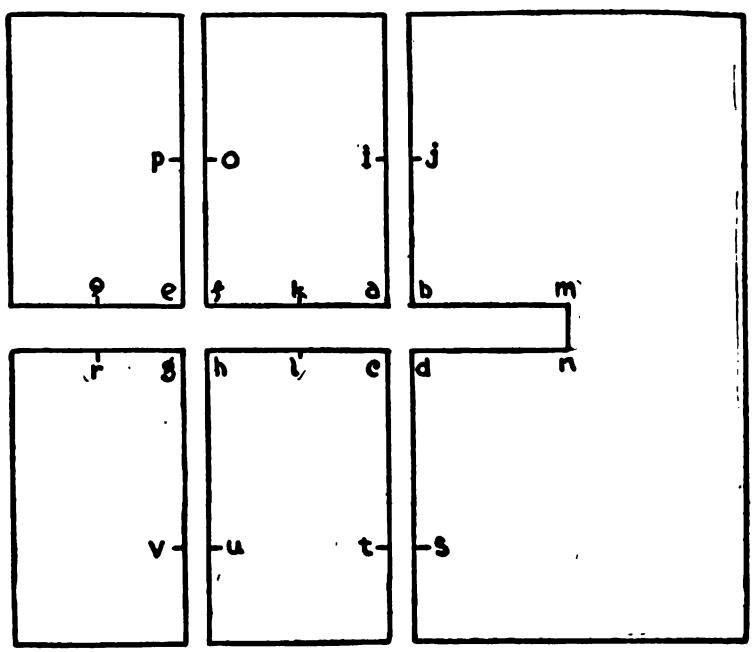
For work on a b c d, the assessment should be on property fronting on a e, c f, b g, d h, and probably g h: See Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

1 Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034.

the end of such alley or subdivision street, if it does not meet another." This practically applies the rule applicable to main street crossings. The chief distinction is that the district is extended only halfway to another alley or street, and not halfway to a main street crossing.[2]

§ 196. **Assessment for Work on Termination of Alley or Subdivision Street in Main Street.**—Subdivision 6 provides: "Where a subdivision street, avenue, lane, alley, place, or court terminates in another street, avenue, lane, alley, place, or court, the expense of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place, or

[2] The following diagram illustrates the rule:

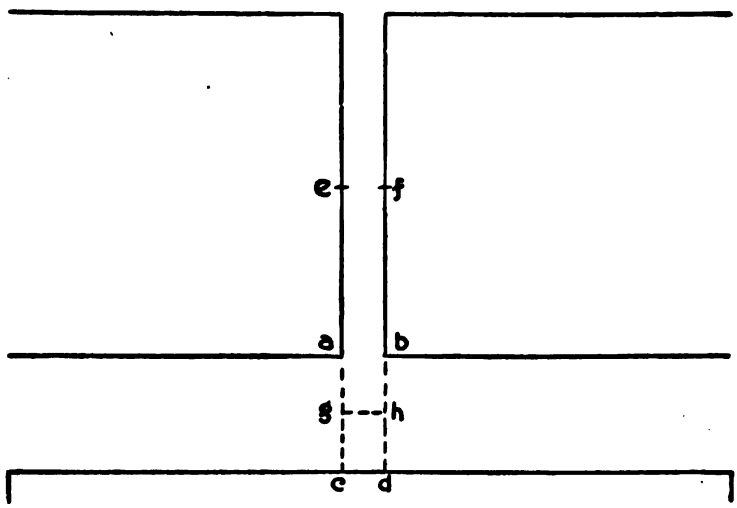


For crossing a b c d, property fronting on a i, a k, b j, b m, c l, c t, d n, d s, and probably m n should be assessed: See Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. For crossing e f g h, property fronting on e p, e q, f o, f k, h l, h u, g v, and g r should be assessed.

court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, avenue, lane, alley, place, or court so terminating, according to its frontage thereon, halfway on each side, respectively, to the next street, avenue, lane, alley, place or court, or to the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination." This makes the same division of the area that is made for main street crossings. The assessment district, however, for work done on the half nearest the alley is limited to the frontage on the alley alone. What has been said as to the meaning of the word "termination" in subdivision 3 applies equally here.[3]

§ 197. **Assessments on Both Sides of Street—Meaning of "Fronting Thereon."**—It has been held that the words

[3] The rules are illustrated by the following diagram:



Work on a b g h should be assessed upon property fronting on a e and b f. Work on c d g h should be assessed on land fronting on c d. For a discussion of subdivision 3, see ante, sec. 193.

These rules were applied in San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72; Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408. See, also, Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; Dyer v. Martinovich, 63 Cal. 353.

"fronting thereon" in subdivision 1 of section 7 refer to the "work authorized by this act," and include property on both sides of the street. In discussing this, the Supreme Court has said: "In our opinion, this is not only the correct construction of the statute, but it is the right method of making the assessment. The principle upon which assessments are made for grading or improving streets is that the improvement will add to the convenience of all persons residing upon each side of such street, and thus enhance the value of the property fronting upon the street so improved in proportion to its frontage thereon. The expense of grading a street may from many causes be much greater on one side of the center line than on the other, or for the same reasons it may be much greater in front of one lot than in front of another of the same width, but the public improvement when made is equally for the benefit of each and every lot abutting on the street. If the lots on the east side of the street can be compelled to pay the entire cost of grading to the center thereof, then the street on the west side may never be improved, or the lots fronting thereon required to contribute to any portion of the grading. One side of a street might be graded one year, and the grading of the other side delayed for years. The owners of the lots on the side unimproved could use the improved side of the street without having paid a cent toward such improvement. Or it might be that owing to the nature and formation of the land that the east side of the street would cost several times as much to grade as the west side. The street when graded would increase the value of the lots on each side equally."[4]

§ 198. Same—Exception Where Part Already Done.—A conflict in the decisions has caused considerable uncertainty as to the rule in cases where work has been done

[4] San Diego Inv. Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082. See, also, Millsap v. Balfour, 154 Cal. 303, 97 Pac. 668; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373.

to the center line of the street before the commencement of the proceedings. Following the cases cited in the last paragraph, it was held in 1908 that property on both sides of the street was assessable for a sidewalk on one side, although the walk may have been laid on the other side before the commencement of the proceedings.[5] This rule was reversed in 1910 by another decision,[6] which held that in such a case only the property on the side upon which the work was to be done was properly assessable. The legislature of 1911 has made this rule clear by two amendments to section 7. Subdivision 7 now reads: "Where any work mentioned in this act (manholes, sewers, cesspools, culverts, crosswalks, piling and capping excepted) is done on one side of the center line of any street, or sewering or resewering is ordered to be done on only one side of any street for any length thereof, the assessment for the expenses thereof shall be made only upon the lots and lands fronting nearest upon that side of the street and for intervening intersections only upon the two quarter blocks adjoining and cornering upon

[5] Millsap v. Balfour, 154 Cal. 303, 97 Pac. 668. Compare San Diego Inv. Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339.

[6] Millsap v. Balfour, 40 Cal. Dec. 473, 112 Pac. 450. In this case the court said: "Balfour had complied with the provisions of subdivisions 10 and 11, and was entitled to exemption thereunder, unless those provisions, so far as sidewalks are concerned, are intended to apply only in cases where the walk subsequently ordered is upon the same side of the street as that upon which the walk is already, in part, laid. But in view of the other provisions of the act, this could not possibly have been intended. At all events, if it was so intended, the effect would be that the law, as to such cases, would not be uniform in its operation, would work unequally, unfairly and unjustly, and it would therefore be unconstitutional. An intent to make an unconstitutional law is not to be imputed to the legislature unless no other interpretation is reasonably possible." The statement that such an interpretation would make the provision unconstitutional is made without any consideration of the authorities, and would seem wrong.

For an application of an earlier provision authorizing an assessment of property on one side of the street, see San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

that side." And subdivision 13 of the same section, after authorizing the council to except any work done to the official grade, provides: "The lots and portions of lots fronting upon said accepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; provided, that this shall not be construed so as to affect the special provisions as to grading mentioned in this act."

§ 199. **Same—Same—Effect on Crossing Assessments.**—In my opinion, the fact that an owner has done work in front of his own land does not release his land from an assessment for crossing work, unless the work on the crossing has also been done to the center line of the street. Where the work on the crossing has been done to the center line, subdivision 7 of section 7 requires the assessment to be made upon the quarter blocks on the opposite side. It would be so manifestly unfair to relieve an owner from liability for crossings merely because he has done the work in front of his own land that I believe the courts will construe this subdivision to mean that the assessment for work on a whole crossing is in all cases to be assessed upon the four quarter blocks cornering thereon.

§ 200. **Provision That Work Shall be Excepted is Mandatory.**—The provision of subdivision 9, that when any work except grading has been done at the expense of the owners the same shall be excepted from the order ordering work to be done, provided that the work is upon the official grade and in condition satisfactory to the street superintendent at the time the order is passed, is mandatory. In discussing this the Supreme Court has said: "The question is thus presented, whether, under the provisions of subdivision 10 [now subdivision 9] of section 7 of the Street Improvement Act the board of supervisors had the power to include in the work ordered the work in front of the defendant's lot,

which had already been performed. These provisions distinguished between grading and other work. The former may be done by the owner only 'after obtaining permission from the council'; and upon the condition of afterward obtaining the prescribed certificate of the chief engineer and filing the same with the superintendent of streets. And when these conditions are complied with, the effect is not to exclude his lot from the subsequent assessment and precedent proceedings, but merely to allow him a credit for the work done. The board of supervisors, therefore, did not exceed its powers in including in its order for the work the grading already done. But with regard to other kinds of work the provision of the law is different. It is simply that the owner of land fronting on a street may do the work, without requiring either permission of the board or certificate of the engineer; and it is expressly provided that the 'work so done at the expense of such owner or owners shall be excepted from the order ordering the work to be done, ... provided that the work so done . . . . shall be upon official grade, and in condition satisfactory to the street superintendent at the time said order is passed.' Here, as we have said, it must be inferred from the findings that the work conformed to the official grade, and was satisfactory to the street superintendent; and it follows that, in including in the order for the work the macadamizing and curbing already done in front of the defendant's lot, and in including her lot in the subsequent assessment, the board acted in contravention of the express prohibition of the statute, and therefore in excess of its powers. The order of the board, and the assessment based thereon, were therefore void."[7]

§ 201. **Credit for Grading Done by Owner.**—Subdivision 9 of section 7 provides: "It shall be lawful for the owner or owners of lots or lands fronting upon any street, the width

[7] De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

and grade of which have been established by the city council, to perform, at his or their own expense (after obtaining permission from the council so to do, but before said council has passed its resolution of intention to order grading inclusive of this), any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon to procure, at his or their own expense, a certificate from the city engineer, setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter to file said certificate with the superintendent of streets, which certificate the superintendent shall record in a book kept for that purpose in his office, properly indexed. Whenever thereafter the city council orders the grading of said street or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contracts must express the price by the cubic yard for cutting and filling in grading; and the said owner or owners, and his or their successors in interest shall be entitled to credit, on the assessment upon his or their lots and lands fronting on said streets for the grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling, or if the grade meanwhile has been duly altered, only for so much of said certified work as would be required for grading to the altered grade; provided, however, that such owner or owners shall not be entitled to such credit as may be in excess of the assessments for grading upon the lots and lands owned by him or them, and proportionately assessed for the whole of said grading." In order to be entitled to credit, the owners must first obtain a permit to do the work.[8]

[8] City and County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396. See, also, De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786. In general, as to the application of this provision, see Bates v. Hadamson, 2 Cal. App. 574, 84 Pac. 51.

It has been held that an injunction will issue to prevent the tearing up of a street for unauthorized grading.[9] The effect of this provision is not to exclude the lot from the assessment, but merely to allow a credit for work done.[10]

§ 202. **District Assessments.**—Subdivision 10 provides for assessments for work done upon the district plan. Its provisions for a procedure preliminary to the making of the assessment we shall discuss later. As to the manner of fixing the burden, it merely provides that the assessment shall be upon each lot "in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land." No rule for determining this benefit is prescribed. The fact that the statute is silent in this respect does not render it unconstitutional.[11] The matter is intrusted, in the first instance, to the judgment of the superintendent of streets. He may adopt any mode he pleases in coming to his conclusion; and it is not necessary that the assessment show what method he has used.[12] Thus, he may base the assessment upon the frontage if he so desires; and the mere fact that the assessment shows that he arrived at his conclusion in a way which appears to assess certain of the property twice does not interfere with the validity of the assessment.[13] Any owner aggrieved has a remedy by an appeal to the council.[14]

[9] City and County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396.

[10] De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

[11] Greenwood v. Morrison, 128 Cal. 350, 60 Pac. 971.

[12] Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

[13] Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

[14] Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

DIVISION 4.

PROCEEDINGS RELATING TO THE ASSESSMENT.

§ 203. Duty of street superintendent to make assessment.
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§ 203. Duty of Street Superintendent to Make Assessment.—It is the duty of the superintendent of streets, at the proper time, to "make an assessment to cover the sum due for the work performed and specified in said contract (including any incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done or, if any direction and decision be given by said council on appeal, then in conformity with such direction and decision." No time is prescribed within which the superintendent must make the first assessment. The contractor, however, is entitled to have the assessment without delay; for he cannot be unnecessarily kept waiting for his pay any more than can an ordinary creditor whose claim is due. If the superintendent neglects or refuses to make an assessment, he may be compelled to do so by mandamus.[1] He is not obliged to make an assessment, however, when the proceedings are void. Such an assessment would be a nullity; and hence a writ of mandate will not issue to compel it.[2] A contractor is not required to accept from the superintendent of streets an incomplete or imperfect document, and may compel that officer to make an assessment according to law.[3]

1 Himmelmann v. Cofran, 36 Cal. 411 (overruled as to authority to make new assessment); Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538.

2 Gray v. Richardson, 124 Cal. 460, 57 Pac. 385.

3 Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538.

§ 204. Acceptance by Street Superintendent a Necessary Condition Precedent.—The assessment is to be made only "after the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent." "The law does not prescribe any particular mode or form in which the superintendent shall manifest his approval or acceptance of work done under a street contract, nor does it require the approval to be expressed in writing."[4] Under a former statute, similar in many respects, it was held that it was not necessary for the superintendent personally to inspect and measure the work. He might accept the statements of his deputy in regard to that. It was necessary, however, for him to accept the work himself.[5] It would seem that this same rule is applicable to an acceptance under the Vrooman Act. It is well settled that the only remedy for an improper acceptance is by appeal to the board; but the question of whether or not the fact of a failure to accept must be so raised has not been decided.[6]

§ 205. Same—Exception—Assessment for Part of Work. Section 12½ provides an exception to the general rule as to the time of making the assessment. It reads: "The city council, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as in sections 8, 9, 10, 11, and 12 of the act of which this is amendatory is provided." This applies only to a contract in force at the time the assess-

[4] Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127.

[5] Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127. As to the duties of the superintendent of streets under one of the old statutes, see Brady v. Bartlett, 56 Cal. 350.

[6] The court refused to decide this point in Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127. As to remedy, see post, sec. 254.

ment is made. If the time for completion has expired, a valid proportionate assessment cannot be levied. Upon this point, the Supreme Court has said: "We think section 12½ is intended to apply to an existing contract—to one still in force; to furnish, as we may well suppose, the contractor with funds to aid him in the completion of the work, and that it was not intended to galvanize and give new life to a dead contract—to confer jurisdiction upon the board to do indirectly what it could not possibly do directly. In the language of the court below: 'That section contemplates, as the basis of such assessment, not only that a part of the improvement has been, but that the whole is to be completed.' We are of opinion the section is provided as a boon to the contractor who in good faith is prosecuting his work within the lines of his agreement, and not as a reward to a defaulting contractor who has forfeited his right to any relief in the premises."[7] It is to be noted that the assessment is a general assessment in proportion to the work done. It is not an assessment merely on lands in front of which the work has been completed. The contractor has no right to insist upon a proportionate assessment. The matter rests entirely within the discretion of the council.

§ 206. One Assessment for Entire Work.—Under a similar provision in a former statute, it was held that the entire expense must be apportioned in one assessment.[8] The assessment does not cease to be a single assessment, however, because the cost of the entire amount is apportioned in separate amounts to the several portions of the territory chargeable therewith in accordance with their relative positions to the work;[9] nor because portions are assessed upon lands not fronting on the work.[10] Where several classes of work

[7] Kelso v. Cole, 121 Cal. 121, 53 Pac. 353. See, also, Kelso Co. v. Gillette, 136 Cal. 603, 69 Pac. 296.

[8] Dyer v. Harrison, 63 Cal. 447. But see McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010.

[9] Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408.

[10] San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

have been done upon the street it is proper to apportion the cost separately for each; and this does not make a divided assessment.[11] Where the work of one class is already done for part of the distance, it is proper to assess the cost for the remainder of the work of that class upon the lots fronting on the portion of the street not formerly so improved.[12]

§ 207. Assessment must Include Incidental Expenses.— The assessment is to include incidental expenses. This term is defined by subdivision 3 of section 34 as follows: "The term 'incidental expenses,' as used in this act, shall include the compensation of the city engineer for work done by him; also the cost of printing and advertising, as provided in this act, and not otherwise; also the compensation of the person appointed by the superintendent of streets to take charge of and superintend any of the work mentioned in section 35 of this act; also the expenses of making the assessment for any work authorized by this act. All demands for incidental expenses mentioned in this subdivision shall be presented to the street superintendent by itemized bill, duly verified by oath of the demandant."[13] Where the assessment contains a charge for such expenses, such as engineer's services, and no appeal is taken, it must be assumed that the work has been done and that the amount included therefor is correct.[14] The cost of former proceedings cannot be charged as incidental expenses.[15]

11 See McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808.

12 McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010. In this case the resolution of intention provided for paving and for sidewalking a portion of the street, except where already done. Sidewalks were laid a portion of the way. It was held that the assessment might be apportioned by charging for the sidewalks only the property in front of which they were laid by the contractor.

13 To the effect that printing is a proper incidental expense, see Burk v. Altschul, 66 Cal. 533, 6 Pac. 393.

For a definition of the term as used in an old statute, see Deady v. Townsend, 57 Cal. 298.

14 McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71.

15 Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635.

§ 208. Preliminary Procedure for Assessment Under District Plan.—Subdivision 10 of section 7 prescribes the necessary procedure preliminary to the making of an assessment upon the district plan. "Whenever the resolution of intention declares that the costs and expenses of the work and improvement are to be assessed upon a district, the city council shall direct the city engineer to make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces, or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the city council, the clerk shall, at the time of such approval, certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the superintendent of streets of said city, who shall after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets or city council, on appeal, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivision of land. In other respects the assessment shall be as provided in the next section." From the foregoing, it is clear that the following steps are essential to such an assessment: (1) A reso-

lution directing the city engineer to make the diagram; (2) a resolution approving the diagram as prepared; (3) a certificate of the clerk certifying the approval and the date; (4) delivery of the diagram to the superintendent of streets. The manner of apportionment has already been discussed.[16] No time is prescribed for the passage of either of these resolutions. The diagram need not be made nor approved before the work is performed.[17] This diagram differs but slightly from the diagram required by section 8. It would seem that it should show that the property is within the assessment district. The contents of the assessment should contain the statements prescribed in section 8. The assessment need not show the method of calculation.[18]

§ 209. **Contents of the Assessment—In General.**—The "assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot, or portion of a lot (if known to the street superintendent); if unknown the word 'unknown' shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram," etc.

§ 210. **Same—Description of Property Assessed.**—It is sometimes said that the assessment itself should contain a description of the property. The only requirement of the statute is that it shall contain "the number of each lot or portion or portions of a lot assessed." The assessment may merely give the number of the lot and refer to the diagram for further particulars. If, in such a case, the diagram suffi-

16 See ante, sec. 202.
17 Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.
18 Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

ciently describes the property, the description is valid.[19] If the diagram is not sufficient in itself, its defects must be supplied in the assessment.[20] The courts take judicial notice of the location of city streets; and hence a description with streets as boundaries is sufficiently definite.[21] The assessment must show that the property is within the city limits; but it is held that the venue of the assessment is sufficient for that purpose.[22] The assessment is to be taken as a whole; and if, in all its parts, it contains the necessary statements, and if its meaning can be ascertained therefrom it will be upheld.[23]

§ 211. **Same—Name of Owner.**—The assessment must contain "the name of the owner of each lot, or portion of a lot (if known to the street superintendent); if unknown the word 'unknown' shall be written opposite the number of the lot." This is imperative. "There is no authority to make an assessment strictly in rem without reference to owners, either known or unknown, or an assessment that shall affect the interest of any party, unless designated in the assessment

[19] In Hewes v. Reis, 40 Cal. 255, the court said: "There is no requirement that the assessment shall be upon one sheet of paper only, and if the description referred to had been upon a separate paper, attached to the paper containing the statement of the amounts assessed, it would probably not have been considered objectionable. The fact that the diagram is also a requirement of the law does not vitiate the reference for the purpose of helping out the description in the assessment. For that purpose it may be regarded as an exhibit attached to and made a part of the assessment. But the very purpose of requiring a diagram to be attached to the assessment is to aid the description given in the assessment, and to enable persons interested to ascertain with greater certainty what property is assessed." See, also, Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

[20] See cases cited in next section.

[21] Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908; Brady v. Page, 59 Cal. 52. See, also, Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590.

[22] Whiting v. Quackenbush, 54 Cal. 306.

[23] Dyer v. Martinovich, 63 Cal. 353.

by name, or, if unknown, it be so expressly stated."[24] Hence, if the superintendent assumes to give the name of the owner, and it proves to be wrong, no recovery can be had on the assessment.[25] Accordingly, it has been held that an assessment to a former owner, who is deceased, is void.[1] Likewise, an assessment to "A and unknown owners" is void, for it does not comply with the statute.[2] If the superintendent of streets is not sure of the ownership, he should assess to unknown owners. The mere fact that certain parties are in open possession and that the record title stands in their names will not impose any duty upon the superintendent to make the assessment in their names.[3] Neither possession nor record is conclusive as to ownership. The word "Unknown" written opposite the

[24] Smith v. Cofran, 34 Cal. 310. As to the requirement under one of the old statutes, see Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595. See, also, cases cited in following notes.

[25] Blatner v. Davis, 32 Cal. 328; Taylor v. Donner, 31 Cal. 480; Smith v. Davis, 30 Cal. 536. See, also, Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254 (reclamation district assessment); Emeric v. Alvarado, 90 Cal. 444, 465, 27 Pac. 356 (general tax; assessed to Castero instead of Castro); Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103 (swamp land assessment). The early case of Conlin v. Seamen, 22 Cal. 546, contra, is overruled.

[1] Smith v. Davis, 30 Cal. 536.

[2] City of Stockton v. Dunham, 59 Cal. 608. See, also, Grimm v. O'Connell, 54 Cal. 522 (general tax); Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103 (swamp land assessment).

[3] Himmelmann v. Steiner, 38 Cal. 175. In this case the court said: "If, then, as is well known, the facts of actual occupancy, claim of title and deed of record are not conclusive evidence of legal title, and no assessment is effectual to create a lien upon lands as against the holder of the legal title unless it be made to such holder by name, or to owner 'unknown,' it is, most clearly, the duty of the superintendent to make his assessment of land to owner 'unknown,' if, after reasonable diligence and inquiry to ascertain the name of the real party holding the legal title, he entertains a rational doubt as to the name of the real party holding the same, notwithstanding a well-known person may be in the actual occupancy of the premises, and, in good faith, claiming to be the owner." This case contains a good discussion of the general principle. Where the property is assessed to "Unknown," the true owner may be held: Dougherty v. Miller, 36 Cal. 89; McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010.

number of the lot is a sufficient designation.[4] This amounts to a certificate that the owner is unknown to the superintendent. Such a certificate is conclusive of the fact so certified, and cannot be collaterally called in question in an action brought upon the assessment. "A party who relies for recovery upon such an assessment is not to be called upon to embark in an inquiry as to the probabilities of the actual state of knowledge possessed by the officer at the time that the certificate was made, but may rely upon it as conclusive, that in point of fact such ownership was unknown to the officer."[5]

§ 212. **Diagram—Form and Contents.**—The assessment must be accompanied by a diagram, attached thereto, "exhibiting each street or street crossing, lane, alley, place, or court, on which any work has been done, and showing the relative location of each district, lot, or portion of lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed, for said work contracted for and performed." All that is necessary is that the description be sufficient in itself to identify the land assessed, and that the relative location of each lot to the work done be shown.[6] Where this appears, an arrow or other mark indicating the points of the compass is not essential.[7] "An arrow is not an essential part of an assessment diagram, though it may, when used, be in some cases an essential part of the description.

[4] Hewes v. Reis, 40 Cal. 255.

[5] Chambers v. Satterlee, 40 Cal. 497, 518. The effect of these holdings is that the superintendent may, in every case, assess to "Unknown." Some of the cases state that he should make inquiry; but inasmuch as his certificate cannot be questioned, it is really immaterial whether he has made inquiry or not.

[6] Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131. See, also, cases cited in following notes.

"The very purpose of requiring a diagram to be attached to the assessment is to aid the description given in the assessment, and to enable persons interested to ascertain with greater certainty what property is assessed": Hewes v. Reis, 40 Cal. 255.

[7] Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131.

Thus, if the work be for the grading of a crossing of two streets, it is obvious that a diagram showing the streets in the vicinity of the crossing, and these streets only, and representing the lot assessed as at one of the corners, would be insufficient, without an arrow, scroll, or something equivalent to show direction; for, otherwise, the lot, as represented, might be in either of the corners. But there are other ways of representing direction. Thus, the course might be written on one of the boundaries of a street or on that of one of the lots, or the direction of the lines might be otherwise indicated."[8] The courts take judicial notice of city streets and of their direction. Hence, it is sometimes possible for the court to determine, from the names of the streets on the diagram, the direction; and in such a case an arrow is clearly unnecessary.[9] It is not always possible, however, to determine direction from the names of streets; and where this is not possible, there must be some other mode used to show it.[10] A numbering of the lots in accordance with an official map may be sufficient if the map is referred to; but where the map is not referred to, the fact that the numbers coincide is not in itself sufficient to make the description definite.[11] Where the frontage

[8] Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131. In Whiting v. Quackenbush, 54 Cal. 306, the court said: "The point of a scroll is as competent as the barb of an arrow to denote north on a map or diagram. Indeed, any peculiarity of shape or color is sufficient for that purpose." See, also, Williams v. McDonald, 58 Cal. 527.

[9] Brady v. Page, 59 Cal. 52. See, also, Whiting v. Quackenbush, 54 Cal. 306. Compare Himmelman v. Cahn, 49 Cal. 285; Norton v. Courtney, 53 Cal. 691.

Where the street upon which the work is done is designated by its official name, and two cross-streets are shown by their official names, the directions are easily determined, for the court knows the relative locations of the two cross-streets. The diagram in the case of Brady v. Page, supra, illustrates this proposition. Where, however, there is but one cross-street shown, the names of the streets alone cannot show the direction.

[10] City and County of San Francisco v. Quackenbush, 53 Cal. 52. The diagram in the case of City and County of San Francisco v. Quackenbush, supra, illustrates the point.

[11] Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042.

of the lot is correctly shown, the fact that the interior lines are incorrectly delineated is immaterial.[12] The diagram must show the number of feet of frontage.[13]

§ 213. **Same—Relative Location of Lots to Work.**—The diagram need not show the work done, nor the part of the street improved. "The diagram is only auxiliary to the assessment, and is intended to be merely a map exhibiting each street upon which the work has been done, and not the particular portion of the street in which the work was done. The requirement that it shall show 'the relative location of each lot assessed to the work done' is satisfied if it shows their location in relation to the exhibited street upon which the work was done. Taken in connection with the description of the work for which the assessment was made, it can then be seen from an inspection whether any of the lots assessed are so located as to be liable for any part of the expense of the work, and if for any reason a particular lot ought not to have been assessed for that work, the error can be corrected upon application to the proper tribunal. The diagram is not intrinsically invalid unless the lots shown thereon are so located they could not under any circumstances be made liable for a portion of the expense of the work. It is not essential to the validity of an assessment that the lots assessed should front upon the entire portion of the street exhibited upon the diagram. In case of an assessment for work done upon main street crossings, or at the termination of one street in another, the street crossing or the termination is required to be exhibited on the diagram, while the lots to be assessed front upon portions of the streets on which none of the work was done, and the diagram is to show their relative location to the work done by showing that they are within the quarter blocks or territory liable to be assessed."[14] An owner of property

[12] Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Dorland v. McGlynn, 47 Cal. 47. But see Himmelmann v. Bateman, 50 Cal. 11, where a failure to show depth was held fatal.

[13] Dyer v. Harrison, 63 Cal. 447.

[14] McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71.

fronting on the street upon which the work has been done cannot object to an assessment for work done in front of the block on the ground that a separate diagram has not been made for the crossing. The contractor is the only one injured.[15]

§ 214. **Authentication of Assessments.**—The assessment must be authenticated by the official signature of the superintendent of streets. The Supreme Court in interpreting a similar provision in an earlier statute said: "This is an official act on the part of the superintendent, and its character and authenticity can be attested in only one manner, and that is the official signature of the superintendent. Its official character must be made to appear on its face. In Himmelman v. Danos,[16] it is held that the copies of the assessment, warrant and diagram found in the superintendent's book could not be considered as a record until signed by the superintendent, because the making of the record was an official act, and its official character must be made to appear on its face. The document cannot be regarded as an assessment, and, standing by itself, it was clearly inadmissible. But it is contended that it was helped out by the warrant, which was signed by the superintendent, and countersigned by the auditor, and was attached to the assessment. This position might be maintained if the two papers constituted only one official document; but they are distinct, and each must be in truth what it purports to be before they can be attached together for the purposes specified in the act. The position contended for would make a summons without the signature of the clerk valid, if it was attached to the other papers constituting the judgment-roll. It is further contended that, as the statute, in providing for the assessment, warrant, and diagram, expressly requires only one—the warrant—to be signed by the superintendent, it was not intended

15 Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

16 35 Cal. 441.

that either of the others should be signed, and the rule that the mention of the one is the exclusion of the others is relied upon to sustain the position. There would be great merit in the argument if either of these documents could be regarded as official, in the absence of an official signature. Its application in respect to the signature of the auditor is very apparent. But the statutory requirement that the warrant should be signed by the superintendent was an unnecessary repetition, for the issuing of the warrant as necessarily imports and includes its signature as the averment that a summons was issued by the clerk imports that it received his official signature."[17]

§ 215. **Warrant—In General.**—Section 9 requires that to the assessment shall be attached a warrant, and then prescribes that it shall be substantially in the following form: "By virtue hereof, I [name of the superintendent of streets], of the city of ———, county of ——— [or city and county of ———], and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower [name of contractor], [his or their] agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be [his or their] warrant for the same. [Date] ——— [name of superintendent of streets]. Countersigned by [name of mayor]." Unless this form is substantially complied with and followed, the assessment is void.[18]

§ 216. **Same—Must be Dated.**—The warrant must be dated. "The form prescribed by the statute makes the date as much a part of the warrant as it does the signature of the officer, and in matters of this character, in which the prop-

[17] Dougherty v. Hitchcock, 35 Cal. 512; Himmelmann v. Cofran, 36 Cal. 411. See, also, Shepard v. McNeil, 38 Cal. 72.

[18] See Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278; Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599. See, also, cases cited in notes to following sections.

erty of a citizen is to be taken in invitum, it cannot be said that any requirement of the statute is to be disregarded. Every requisite having the semblance of benefit to the owner must be complied with; and where the form of a statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings."[19] The date includes the month and the day of the month, as well as the year.[20] The date stated in the warrant is not conclusive, if it is inconsistent with other dates which appear in the records or documents of which the record is a part. "The time at which an instrument becomes operative, or has the legal effect for which it is made, is its date. The date which is written in an instrument is prima facie its actual date, but when the rights of a person depend upon or are measured from the date of an instrument, it is competent to show that the date written therein is not its actual date."[21]

§ 217. **Same—Must be Signed and Countersigned.**—The statute requires that the warrant be signed by the superintendent of streets and countersigned by the mayor. The countersigning by the mayor is the only requirement in addition to the ordinary requirement for authenticating an assessment. Although the mayor must exercise discretion, his duty is not judicial; and if he improperly refuses to countersign a warrant he may be compelled to do so by mandamus.[22] In an early case it was said that it is a mere ministerial duty. Hence, the fact that, by assignment, he is interested in the contract at the time of the warrant, does not, it is said, disqualify him from countersigning.[23]

19 Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599.

20 Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599.

21 Cotton v. Watson, 134 Cal. 422, 66 Pac. 490.

22 Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766. This case contains a good discussion of the remedy of mandamus. The statute interpreted required the auditor to countersign the warrant; but the principle is the same.

23 Beaudry v. Valdez, 32 Cal. 269. In this case the mayor, prior to his election, had become the assignee of the contract as collateral

His function is not called into exercise until the warrant is completed. Hence, no act of his can supply any defect or cure any irregularity in the prior proceedings.[24] In the absence of the mayor, the warrant may be countersigned by the acting mayor. Where a warrant is so signed, the presumption of regularity attaches, so that no proof of the absence of the mayor need be made.[25]

§ 218. Same—May be Made in Name of Assignee.—When the contract has been assigned, the warrant may be made out in the name of the assignee. "The form of the warrant which is prescribed in the Street Improvement Act in terms authorizes and empowers the contractor, his agents or assigns, to demand and receive the several assessments, and the act declares that the warrant shall be 'substantially' in this form. The right of the contractor to assign the contract prior to the completion of the work is recognized in many portions of the act, and has been recognized by this court. After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name especially since the statute does not specially require it."[1] It is not necessary that the warrant describe the assignee as such.[2] The purpose of naming the party in the warrant is to notify the owners to whom they may make payment. They are justified in making payment to the person named therein. Hence, the fact that the original contractor is not named is immaterial. In an early case it was intimated that the warrant may be made out in the name of the original contractor, notwithstanding the assignment. "It is lawful and regular

security for the payment of a note which he held against the contractor for money loaned by the former to the latter to enable him to proceed with the work under the contract.

24 Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599.

25 City Street Imp. Co. v. Rontet, 140 Cal. 55, 73 Pac. 729.

1 Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278.

2 Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278.

for the superintendent to deliver it to the parties named in the contract. The form of the warrant is the same in all cases, and in the absence of any notice of an assignment of the contract, and perhaps in any event, the superintendent delivers it, as a matter of course, to the original contractor if applied for by him, if not to any other person authorized by him to receive it either as agent or assignee."[8]

§ 219. **Same—Effect of Delay in Making.**—Upon the question of the effect of delay in making the warrant and assessment, the Supreme Court has said: "As the statute does not prescribe any particular time after the acceptance of the work within which the superintendent shall issue the assessment and warrant, the mere lapse of time for more than the period fixed as the duration of the lien is not of itself a bar to their issuance, since the issuance may have been delayed by circumstances sufficient to justify the delay. Whether they were sufficient therefor was to be considered by the officer before making the assessment, and, as he is presumed to have regularly performed his official duty, his act in making the assessment is entitled prima facie to be considered valid if there could have been any circumstances under which an assessment would, after such lapse of time, have been authorized. If there are any such facts or reasons why the lapse of time was such as to deprive him of the right to make the assessment, they should be presented as affirmative matter in defense thereto." The fact that the contractor is entitled to demand the assessment and the warrant immediately upon acceptance of the work does not affect this rule. "A party cannot by his own negligence, or for his own convenience, stop the running of the statute. The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule, however, ceases when the right of action is not under his control, but depends upon

[8] Taylor v. Palmer, 31 Cal. 241.

the act of another; and when the act upon which his right to maintain an action depends is an official act to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable." The court proceeded to say that if it had appeared that the contractor neglected to make a demand for an assessment and warrant within a reasonable time, or for a period greater than that during which the assessment would have been a lien on the property, there might be some ground for holding the right to enforce barred.[4]

§ 220. **Record of Assessment, Warrant, Diagram and Certificate—In General.**—Section 9 further provides that the "warrant, assessment, and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment, diagram and certificate, all persons mentioned in section 11 of this act shall be deemed to have notice of the contents of the record thereof." From this, it is clear that recording is an essential step in the perfecting of a lien.[5] Hence, it becomes important to determine exactly what must be recorded, and what the record must contain. There is no real question as to what is meant by the warrant, assessment, and diagram. There is a serious question, however, as to the engineer's certificate, upon which the later decisions are directly opposed to the earlier.

§ 221. **Same—Sufficiency.**—The purpose of the record is to give notice by an inspection of the record to the owner

[4] Williams v. Bergin, 116 Cal. 56, 47 Pac. 877.

[5] See Himmelman v. Danos, 35 Cal. 441. See, also, cases cited in notes to following sections. The record must be made before delivery of the warrant to the contractor: Moffitt v. Jordan, 127 Cal. 622, 69 Pac. 173.

and all others having dealings with the property. It follows that any variance between the original and recorded instruments which defeats this purpose is material. On the contrary, if the diagram and assessment as recorded do contain a sufficient description, then a slight variance will be held immaterial.[6] A mere clerical defect is not fatal, if the record otherwise conveys information as to all the steps in the proceedings.[7] Thus, the omission of a copy of the signature of the mayor to the warrant does not affect the validity of the record.[8] Referring to the documents to be recorded, the Supreme Court said, in an early case: "Though not essential to the validity of the record, they should be recorded in the order of their coming. Like the summons, complaint, and answer in a judgment-roll, they constitute different parts of the same record."[9] Where it is essential to record the engineer's certificate, it should be recorded in the assessment record. Recording it in another book is not sufficient.[10]

§ 222. **Same—Engineer's Certificate—Meaning.**—The nature of the engineer's certificate is not defined in the statute, nor is there any provision of the statute expressly requiring him to make a certificate except in the case provided for by subdivision 9 of section 7. Presumably the certificate referred to in subdivision 1 of section 34 is the one meant.[11]

6 Labs v. Cooper, 107 Cal. 657, 40 Pac. 1042; Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131. In the following cases the record was held insufficient because of a defect in the description: Norton v. Courtney, 53 Cal, 691; Himmelmann v. Bateman, 50 Cal. 11.

In Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131, it was intimated that in some instances the record might correct the original. This seems to me a doubtful proposition.

7 Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173. See, also, San Francisco v. Certain Real Estate, 50 Cal. 188.

8 Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351.

9 Himmelman v. Danos, 35 Cal. 441.

10 Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337.

11 Gray v. Lucas, 115 Cal. 430, 47 Pac. 354; Frenna v. Sunnyside Land Co., 124 Cal. 437, 57 Pac. 302; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

That provision reads as follows: "The city engineer, or where there is no city engineer, the county, or city and county surveyor, shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services."

The engineer's certificate is not part of the assessment. "Prior to the amendment of 1889, it was only necessary for the city engineer to deliver his certificate to the superintendent, and it would be thereupon filed in the office of the last-named officer. In that year the legislature amended the section by requiring the certificate to be recorded in the office of the superintendent of streets. There is no requirement that it shall be attached to the assessment, although, for convenience sake, it may be desirable to do so in order that the several documents may be kept together." [12]

§ 223. Same—Same—Later Cases Hold Record of Certificate Unnecessary.—Except in the single case mentioned in subdivision 10 of section 7, no certificate whatever need be made nor recorded; and if made and recorded, its form is immaterial. "To put into the statute by implication, first,

12 Gray v. Lucas, 115 Cal. 430, 47 Pac. 354. See, also, Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025 (holding record of certificate essential to lien); Frenna v. Sunnyside Land Co., 124 Cal. 437, 57 Pac. 302.

a requirement not there, that the engineer must make some kind of a certificate, and second, the requirement, not there, that the certificate must be of a certain form or must contain certain things, and then to hold the assessment void because the engineer's certificate does not fully comply with these implications, would be, even as against proceedings in invitum, to carry the doctrine of strict construction beyond all reasonable bounds. . . . . Where the certificate is made otherwise than in the case provided for in the subdivision cited, it is simply for the purpose of assisting the superintendent of streets, upon whom, by section 8, is devolved the function of determining whether the contract had been satisfactorily performed. It follows that the certificate, if satisfactory to the superintendent, cannot be defective, or, in other words, that its contents are immaterial to the validity of the lien."[13] It has been said that where the certificate is in fact made, it should be recorded.[14] Inasmuch as the form is immaterial, it would seem questionable whether this requirement is of any real benefit to the owners. The courts have not yet passed upon the question of the effect of a failure to record such a certificate when made.[15] Its absence from the record would not affect the validity of the proceedings on their face.

§ 224. **Same—Same—Form and Contents.**—The engineer's certificate, where required, may be signed by his deputy but not by a mere clerk. Upon this point the Su-

[13] O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

So far as the earlier cases are in conflict, they are overruled. See the following cases for instances of certificates held sufficient: San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

[14] Reid v. Clay, 134 Cal. 207, 66 Pac. 262; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

[15] The only cases passing upon the point at all are those in which the certificate is treated as essential. Those cases, as we have already seen, have been overruled.

preme Court has said: "That such certificates may be made by a deputy is not questioned; and as the city and county surveyor, or city engineer, has ample power to appoint deputies, necessity cannot be urged in justification of the performance of any official duty by a clerk. Deputies must be appointed in writing filed with the county clerk, and by section 910 of the Political Code must make and file an oath in the manner required of their principals. The making of these certificates seems to be the final acts of the city engineer in reference to the work. It is the evidence of the completion of the work under the contract, and according to the plans and specifications prepared by him, and is then required to be recorded in another office by another and different officer. There is nothing to call the attention of the city engineer to these certificates after they are signed; and, if they may be prepared and signed by a clerk under a general direction, such as is here shown, the official duty of determining from the notes of the field deputies whether the work is completed according to the plans, specifications and contract is delegated to an irresponsible clerk, and may be made and handed to the superintendent of streets wholly without the knowledge of the city engineer. These certificates so made and signed are invalid, and insufficient as the basis of a lien upon property chargeable with the expense of the work."[16] Where the term of the engineer who was in office when the work was completed expires before the certificate is made, it may be made by his successor.[17]

§ 225. **Same—Authentication.**—The record must be authenticated by the signature of the superintendent of streets. "The making of the record is an official act, and its official character must be made to appear upon its face, which can

[16] Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337. See, also, Frenna v. Sunnyside Land Co., 124 Cal. 437, 57 Pac. 302. As to the contents of the certificate, see Obermeyer v. Patterson, 130 Cal. 531, 62 Pac. 926.

[17] Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

be done only by adding a certificate signed by the officer authorized to make the record. Until certified and signed by the proper officer, it is but waste paper, of which no one need take notice. To become a record, it must be the official act of the officer authorized to make it—to become his act it must have his signature. Until signed it is the act of no one, and is as valueless for any purpose as an unsigned deed or sheriff's return. The only difference between that which is record and that which is not is the official stamp of authenticity which the former bears upon its face. The former proves itself, the latter does not. The former proves itself because it bears the stamp of an officer of the law, acting under the solemnities of an oath, or at least of official duty; and it is the official stamp, and nothing else, which makes it record."[18] The superintendent's certificate will not be strictly construed. It will be upheld if the meaning can be fairly ascertained.[19]

§ 226. **Delivery of Warrant, Assessment, and Diagram to Contractor or Assignee.**—Section 9 provides that "after said warrant, assessment, diagram, and certificate are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agent or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments." A delivery before record is premature and of no avail.[20] This

18 Himmelman v. Danos, 35 Cal. 441.

19 See Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173 (certificate omitted to mention the engineer's certificate); Himmelmann v. Hoadley, 44 Cal. 225 (referred to one page only); Greenwood v. Chandon, 130 Cal. 467, 62 Pac. 736.

20 Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173; Cotton v. Watson, 134 Cal. 422, 66 Pac. 490.

clearly authorizes a delivery to an assignee. Where the superintendent of streets has no notice of an assignment, he may, of course, deliver to the original contractor.[21] Where he has notice of the assignment, it is questionable whether he has a right to deliver to the original contractor.[22] Where it is delivered to the original contractor after an assignment, he takes it as agent of the assignee.[23] The courts have not decided as to the effect of a delivery before payment of incidental expenses. It has been held, however, that a failure to fulfill the requirement that the contractor shall advance incidental expenses before being entitled to the contract does not interfere with the validity of the contract.[24]

§ 227. Lien of the Assessment—Commencement and Duration.—The contractor's lien dates from the recording of the warrant, assessment, and diagram, and lasts for a period of two years, unless sooner discharged. This means that an action to foreclose must be commenced within that time. If the action is commenced in time, the lien continues as against the defendant so long as the action is pending.[25] "The only remedy which the contractor has in case of nonpayment of the assessment is a suit to enforce the lien upon the lot. He can do no more, if the assessment be not paid on demand, than commence his action in due time and prosecute it with due diligence; and he cannot be held responsible for delays that may occur in the proceedings, without any fault on his part."[1] It does not continue as against purchasers, however, after the lapse of two years, unless notice is given by lis pendens.[2]

21 Taylor v. Palmer, 31 Cal. 241.

22 Taylor v. Palmer, 31 Cal. 241.

23 Taylor v. Palmer, 31 Cal. 241.

24 Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658.

25 Randolph v. Bayue, 44 Cal. 366; Dougherty v. Henarie, 47 Cal. 9; Himmelman v. Carpenter, 47 Cal. 43.

1 Randolph v. Bayue, 44 Cal. 366.

2 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278. For a further discussion of lis pendens, see post, sec. 311.

§ 228. **Same—Property Liable.**—The assessment is a lien upon the lots as they existed when the jurisdiction of the council to order the improvement attached. That time is fixed by section 3. An owner cannot, after that time, by a conveyance of a part of the property, deprive the contractor of his right to a lien upon the whole parcel. Thus, in an early case, the owner conveyed a strip three feet wide along the frontage after the work was ordered. The court said: "The jurisdiction of the board of supervisors attached upon the existing state of things, and the contract must be presumed to have been entered into in view of that fact. The jurisdiction, when it once attached, extended through all subsequent proceedings regularly had, till the assessment was made and collected. That jurisdiction could not be ousted by the act of a lot owner."[3] It is to be noted that this denies the right of the owner to convey a part so as to release it from the lien even before the lien has attached. The ordinary rule is that an owner cannot deal with his property so as to interfere with the rights of a lien claimant after the lien has attached.[4] The California rule, however, seems just and reasonable. Whether an owner can convey a narrow strip before the jurisdiction has attached and thus restrict the contractor's lien has not been decided; but it would seem that such a conveyance, if made with the intent of avoiding an assessment, is fraudulent, and that the lien should be held to attach to the whole parcel.[5] Where, how-

[3] Dougherty v. Miller, 36 Cal. 83.

[4] See Eagle Mfg. Co. v. Davenport, 101 Iowa, 502, 70 N. W. 707, 38 L. R. A. 480.

[5] In Eagle Mfg. Co. v. Davenport, 101 Iowa, 502, 70 N. W. 707, 38 L. R. A. 480, the owner, for the purpose of avoiding an assessment, conveyed a strip two feet in width along the frontage, after the letting of the contract but before the commencement of the work. The court held that the lien did not attach until the commencement of the work, and hence, in the absence of fraud, would attach only to the portion of the lot belonging with the frontage. It was held, however, that the fraud was such as to make the whole lot liable. It would seem that this principle applies to the case mentioned in the text.

ever, the transfer is not made with any intent to defraud, and conveys a parcel large enough to overcome any presumption of fraud which might arise from the transfer of a very narrow strip, the lien would undoubtedly be held to attach only to the property as it was when the jurisdiction of the council attached.

§ 229. Same—Priority Between Assessment and Private Liens.—The lien of the assessment is prior to all liens of private individuals, whether such other liens are prior in time or not. "Whether the power to tax for street improvements is to be referred to the general taxing power and the power of eminent domain, or, as some courts have suggested, to the police power, is not very important. Whatever its source may be, it exists beyond question by reason of its nature and objects, and that it partakes of the nature of the taxing power must be admitted. The power to levy a tax for general purposes, which shall be a lien superior to all other liens, prior or otherwise, is not doubted, and it is not because it is called a tax, but because of its object and the necessity for raising revenue in order to execute the functions of government. In modern times, whatever may have been the demands of society in an earlier period of the development of the government, the necessity for improving the streets of cities and towns, while perhaps less important in degree than the general objects of government, is yet important and necessary to the welfare of the whole community, and in our opinion the principles on which the system of general taxation depends, and which govern in the enforcement of tax levies for general purposes, are also applicable to taxation for the improvement of streets, the construction of sewers, and other like public work. It is a mistaken assumption that the improvement of a particular street in a city is solely for the benefit of adjoining property owners; the benefit accrues to the public generally, and the power to compel such improvements is essential to the well-

being of communities."[6] Accordingly, it is held that the lien of a street assessment is prior to the lien of a prior mortgage;[7] and it is prior although an absolute deed is given to secure the debt.[8] Upon the same principle, it is held that the lien of a street assessment takes precedence over a homestead.[9]

§ 230. Same—Priority Between Assessment and Lien for General Taxation.—It is probable that a lien for an assessment under the Vrooman Act is subsequent to the lien of general taxation. In an early case the Supreme Court said: "The general rule is that a sale and conveyance in due form, for taxes, extinguishes all prior liens, whether for taxes or otherwise. The necessity of collecting revenue for the support of the government imperatively requires that the lien for taxes shall take precedence over all other liens; and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected."[10] This last sentence, of course, does not state a valid argument under the present system whereby the state

[6] German Savings & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. This is a case under the Bond Act. No constitutional right of the prior lienholder is violated.

[7] O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Chase v. Trout, 146 Cal. 350, 80 Pac. 81. See, also, to the same effect under the Bond Act, German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. The mortgagee is said to be as much bound by the proceedings as if he were the owner.

For a good discussion of the priority of liens for general taxes over mortgages, see California Loan & Trust Co. v. Weis, 118 Cal. 489, 50 Pac. 697.

[8] Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119.

[9] Perine v. Forbush, 97 Cal. 305, 32 Pac. 226. "The cost of making improvements like those embraced in this contract is as much a charge against the homestead as against any other property fronting upon such improvements."

In general, as to the liability of homesteads for street assessments, see 45 Am. St. Rep. 387, note.

[10] Dougherty v. Henarie, 47 Cal. 9.

becomes the purchaser. The court, however, proceeds to quote a provision of the statute, quite similar to section 3787 of the Political Code, and holds squarely that that provision makes the title by a tax deed free from the lien of a street assessment. Section 3787 of the Political Code provides that a tax deed "conveys to the state the absolute title to the property described therein, free of all encumbrances, except when the land is owned by the United States, or this state."

§ 231. Same—Priority Between Successive Assessments. As between successive street assessment liens, it is held that the priority depends upon the time of the accrual of the lien, the first in time being prior in right.[11] This priority is not lost nor affected by the fact that the second claimant acquires the first judgment and purchases at the first sale.[12]

§ 232. Demand—In General.—Section 10 provides for a demand within thirty days. "The contractor, or his assigns, or some person in his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. . . . . Whenever the person so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as 'Unknown' on the assessment, then the said contractor, or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed." Referring to a similar provision in an earlier statute, the Supreme Court said: "There are three modes in which the demand may be made: First, of the person assessed; second, of his agents; and third, a demand publicly made on the premises assessed. The purpose of the demand is very obvious. Up to that time the owner has only constructive notice of the proceedings, from their initiation up to the recording of the warrant, assessment and diagram; and as by the record a lien is cast upon his property, he is

11 Brady v. Burke, 90 Cal. 1, 27 Pac. 52.
12 Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

required to be notified in order that he may take the proper steps for its discharge. The statute gives him certain days of grace—not less than five nor more than fifteen—within which to pay the amount due, so as to relieve his lot of the lien and save himself from the annoyance and expense of defending an action for its enforcement, and also to enable him to take an appeal to the board of supervisors upon questions respecting the legality or correctness of the assessment, etc. The purpose of the demand was to give him the full benefit of those days of grace. The record of the warrant, assessment and diagram, it is declared by section 10, shall be constructive notice to him of its contents; and, of course, the statute could not be reasonably construed as intending that another proceeding should be taken within the ensuing ten days, to impart to him again constructive notice of the same thing. It was devised as the surest and readiest means by which actual notice might be imparted to him, if that was practicable. Impossibilities are not required of the contractor. He is not required to call on the owner if he cannot be found, nor upon the agent (if he has an agent) if he cannot be found, nor to go upon the premises if they are inaccessible. The warrant is a process which he is required to serve, and he is held to the same measure of diligence in its service as an officer holding legal process for service. He must make diligent search and inquiry for the person assessed.'' [13] A failure to exercise due diligence to give this actual notice may result in the owner losing the right to appeal under section 11. Hence, the right to receive the notice is substantial, and a failure to give it is fatal to the right to recover.[14]

§ 233. **Same—What must be Demanded.**—The demand must be for the amount legally due.[15] A single demand for

13 Guerin v. Reese, 33 Cal. 292.

14 McBean v. Martin, 96 Cal. 188, 31 Pac. 5.

15 Dyer v. Chase, 52 Cal. 440; Donnelly v. Howard, 60 Cal. 291; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351.

more than is legally due is of no avail, and is insufficient to authorize a foreclosure of the lien.[16] Where the demand is first made for the amount legally due, the fact that a second demand is made for a larger amount is immaterial.[17] Where the demand is made publicly on the premises, the amount due on each lot must be separately demanded. It is not sufficient to make one demand on one lot for the aggregate amount due on several lots.[18] It is not necessary to state to whom the money should be paid. The statute makes no such requirement, for the reason that it is not necessary to express what is obviously understood.[19]

§ 234. **Same—By Whom Made.**—The demand must be made by the "contractor, or his assigns, or some person in his or their behalf." It is clear from this that an assignee may make it.[20] And the fact that he purports to make it on behalf of the contractor is immaterial. He is the owner of the claim and may notify the property owner to pay to him or to his agent, or to any other person.[21] Where a claim is assigned merely by way of security, the original contractor may still make the demand.[22] Where the contractor assigns half of his claim, he may make the demand for the whole claim. It is not necessary to show that he was also agent for the owner of the other half.[23] The assignee need not make the demand in person, but may make it through an agent.[24]

16 Id.

17 Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

18 Schirmer v. Hoyt, 54 Cal. 280.

19 Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

20 Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

21 Banaz v. Smith, 133 Cal. 102, 65 Pac. 309. See, also, Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

22 Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081.

23 Gaffney v. Gough, 36 Cal. 104.

24 Himmelmann v. Woolrich, 45 Cal. 249.

§ 235. **Same—When must be Made upon Owner.**—If the owner is named in the assessment, the demand must be made upon him, if he can conveniently be found; if this cannot be done, upon his agent, if he can conveniently be found; if both are impracticable, public demand must be made upon the premises. "The word 'conveniently,' in the section requiring the contractor to call on the person assessed, if he can conveniently be found, and demand payment, is very unusual in such a connection, though the proper interpretation may not be doubtful. It certainly does not mean that he should call on the owner of the lot if it suits his convenience. It may, in one sense, be inconvenient for him to leave his residence, or to pass along a single block, or to enter the lot owner's place of business to demand payment; but that interpretation would make the requirement a useless and absurd one. Whatever it is the duty of an officer to do while engaged in the performance of services enjoined upon him by law, and may be accomplished by the exercise of reasonable diligence, that, it may be said, can conveniently be done by him. The effort must be made to find the person assessed before going in search of his agent, and the return must show that fact. . . . . Before the contractor is permitted to resort to the third method of making the demand he must have exhausted the second as well as the first mode. He should show either that the person assessed has no agent, or, if he has an agent, that he could not be found."[25]

§ 236. **Same—Upon Agent.**—The meaning of the word "agents" is not defined by the statute. The purpose of the demand is to impart notice. Hence it would seem that it should be made upon an agent authorized to receive such notice for his principal. It is elementary that a principal is charged by notice to his agent only when the subject matter is within the scope of the agent's authority.[1] A de-

[25] Guerin v. Reese, 33 Cal. 292. See, also, McBean v. Martin, 96 Cal. 188, 35 Pac. 1.

[1] See Pomeroy's Equity Jurisprudence, sec. 668.

mand upon an agent authorized only to sell horses would not, in general, give any notice to the principal. On the other hand, it may be argued that a demand on such an agent would be more likely to give actual notice than a public demand on the premises and that as the wording of the statute is general, the fair inference is that a demand upon any agent is to be made when he can conveniently be found. Another question arises as to what diligence must be used to determine the fact of agency. Clearly the contractor cannot be compelled to rely upon the declaration of the alleged agent, for such a declaration would not be competent evidence to charge the principal.[2] It is suggested that the demand need not be made upon an agent unless the contractor can, by the exercise of reasonable diligence, procure evidence competent to prove the fact of agency as against the principal.

§ 237. **Same—On the Premises.**—The statute authorizes a public demand upon the premises in two cases: (1) Where neither the person assessed nor his agent can conveniently be found; (2) where the property is assessed to unknown owners. In the first case, as we have already seen, the demand may be made on the premises only after an attempt to find the owner and his agent has failed. In the second case, there is no alternative. The demand must be made publicly on the premises. "It matters not that other methods may be as efficacious as the one provided. The lawmakers have prescribed a method, and the courts are not at liberty to adopt a substitute therefor."[3] Accordingly, it is held that in such a case a personal demand upon the owner, off the premises, is of no avail.[4] There is a dictum

2 Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 Pac. 738; Petterson v. Stockton & T. R. Co., 134 Cal. 244, 66 Pac. 304.

3 Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

4 Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530. For an earlier case holding a personal demand unnecessary, see Whiting v. Townsend, 57 Cal. 515.

in an early case to the effect that where persons are living on the premises the demand should be made upon them, the court saying: "The requirement of the statute would not be satisfied in such a case by a demand made by the contractor standing upon one corner of the lot and speaking in a tone of voice which, while it might be said to be audible, would not be audible to a person upon the opposite corner of the lot, or within the dwelling-house on the lot."[5] This rule, if followed out logically, might work undue hardship upon the contractor. For instance, it might be almost impossible to make a demand under such conditions when there is a large business block on the property, with many tenants. It seems to me doubtful whether the dictum will be followed. The demand must be public. Hence it must be made in a tone of voice sufficient to constitute a public announcement.[6]

§ 238. **Same—Same—How Made.**—The public demand must be made on the premises and not merely near them. Upon this point the Supreme Court has said: "The contention of the respondent is, that if the person making the demand is in such close proximity to the premises that his voice can be heard thereon, all the objects of a demand are attained, and that a physical, corporeal contact with the premises by the person making the demand can add nothing to its efficiency; and such seems to have been the view of the court below. So far as the present case is concerned, at least, this view seems plausible. We must, however, give to this provision of the statute an interpretation alike applicable to all cases arising under it. If the demand may be legally made by one not actually upon the premises, then how far from such premises may he remain, and the demand still be held good? If it be answered that it may be made at any distance, provided the voice can be distinctly heard upon the premises, the response must be that the effect of this rule

[5] Himmelmann v. Townsend, 49 Cal. 150.
[6] Himmelman v. Booth, 53 Cal. 50.

will tend to substitute the opinion of the person making the demand as to whether he could be heard for an essential fact in the case, and will tend to open a door for fraud. Premises of this character in a city will usually have an occupant, or some person in charge, to whom the presence of a person upon them in the attitude of an apparent trespasser will in itself many times attract attention and cause the demand to be heard. Many reasons more or less cogent might be urged why the lawmakers required a demand to be made upon the premises to be charged, but it is sufficient to say that the statute so requires, and that in our opinion by the term 'on the premises' the lawmakers meant 'by a person on the premises.' "[7] Where a description of the property is such that the lot is shown to extend to the center of the street, it would seem that a demand on the portion of the street included within the lot is sufficient.[8] Where, however, the description is not sufficient to show that the lot extends to the center of the street, a demand made upon the street is not sufficient.[9] A demand must be made upon each lot assessed. It cannot be made upon one lot for the aggregate amount of an assessment upon several lots.[10]

[7] Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530. In my opinion, this construction is too technical. There seems to be no weight in the argument that another holding would tend to substitute the opinion of the person making the demand. We have already seen that the demand must be public, and that this requires an audible tone of voice. Whether the tone of voice is audible is a matter of fact and not of opinion. It is easily conceivable that it may be impossible to go upon the premises. For instance, where there is a store covering the entire property and a locked door, or a high fence around vacant property, it might be a practical impossibility. The law does not require the contractor to resort to sledge hammers and ladders. This absurdity shows, I believe, that an absolutely literal construction should not be given. The requirement should be construed reasonably, in order to effect the purpose intended.

It would seem that the demand may be made on any portion of the lot: Ede v. Knight, 93 Cal. 159, 28 Pac. 860.

[8] Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

[9] Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

[10] Schirmer v. Hoyt, 54 Cal. 280.

§ 239. **The Return—Time for.**—Section 10 requires that "the warrant shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon, signed by the contractor, or his assigns, or some person in his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid, in whole or in part, and the amount thereof." Inasmuch as the time for the return is prescribed, it must be made within that time. The time is computed, however, from the time of the record of the warrant, and not from the date it bears on its face. The Supreme Court, after referring to the several provisions, said upon this point: "A consideration of these several provisions of the statute leads to the conclusion that the 'thirty days after the date of the warrant,' which is the limitation of time upon the right of appeal from the assessment, is to be counted from the time that notice of the assessment is imputed to those who have the right to appeal,—i. e., the date of the recording of the warrant; that as the warrant cannot be delivered to the contractor until after it has been recorded, the date upon which it is recorded, and not the date which is written therein, is its actual date, and the day from which is to be computed the thirty days within which he must return it to the superintendent of streets. It was the evident intention of the legislature that the time within which an appeal might be taken from the assessment, and within which the warrant should be returned to the superintendent, should be the same, and that the contractor should have thirty days from the time at which he was entitled to receive the warrant within which to make his demand and return. Otherwise, or upon the construction contended for by the respondent herein, the superintendent might fail or omit to record the warrant for so long a time after he had written therein the date at which he made it, that these rights of the parties would be essentially impaired, if not destroyed. The statute ought not to receive

a construction which would permit such injustice, unless imperatively demanded by its language. The legislature doubtless contemplated that the date of the warrant would be the same as the date of its recording, but it must be held, under the foregoing provisions of the act, that if they do not correspond, the date of the recording is to be regarded as the 'date of the warrant,' from which the time within which any action founded thereon, or any right created thereby, is to be computed."[11]

§ 240. **Same—Contents.**—The return must state the "nature and character of the demand." This requires a statement of whether it has been personal, upon an agent, or public upon the premises. In cases where the owner is named in the assessment, the return must show either a personal demand or the reason it was not made.[12] In an early case, it was said that a return that the owner "cannot be found," or that the contractor "could not find" him, would be sufficient.[13] This, however, is a mere dictum. It certainly is better to state what diligence has been used. The return must be signed by some person on behalf of the contractor or his assignee, and must be verified. It is not necessary, however, that it be signed by the superintendent of streets.[14] The authority of the person making the demand will be presumed from the return.[15]

§ 241. **Record of Return and Contract.**—Section 10 provides that "thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full

11 Cotton v. Watson, 134 Cal. 422, 66 Pac. 490.

12 Guerin v. Reese, 33 Cal. 292.

13 Guerin v. Reese, 33 Cal. 292.

14 San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076.

15 Reid v. Clay, 134 Cal. 207, 66 Pac. 262. See, also, to the same effect under earlier statutes, Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081; Whiting v. Townsend, 57 Cal. 515.

length in a book to be kept for that purpose in his office, and shall sign the record." This provides for the recording of two documents, the return and the contract. It has been held that the record of the return is a prerequisite to the existence of a valid right of action; and hence a failure of the superintendent of streets to sign the record of the return will prevent a recovery.[16] A mere clerical error in the record, such as the omission of a part of the date of the affidavit, is not fatal.[17] The statute does not prescribe the time within which the record must be made;[18] but, of course, it must be made during the existence of the lien and before the commencement of the action. The recording of the contract is not a prerequisite to the existence of the lien;[19] and a failure to record it will not prevent a recovery.[20]

§ 242. **Interest upon Unpaid Assessments.**—Section 10 provides that "after the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid." Section 12 authorizes the recovery of such interest in an action to foreclose the lien. The obligation to pay interest does not arise until after the owner has had an opportunity to pay. If he fails to pay, he can have no legal objection to the interest charge.[21] It is probable that the ten per cent rate is in force only until judgment. Section 1920 of the Civil Code provides: "Interest is payable on judgments

16 Witter v. Bachman, 117 Cal. 318, 49 Pac. 202.

17 Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173.

18 See Himmelmann v. Reay, 38 Cal. 163.

19 Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772. See, also, Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

20 In Witter v. Bachman, 117 Cal. 318, 49 Pac. 202, Chipman, C., said: "If the decision of the case were to rest wholly on the failure of the plaintiff to show that the superintendent failed to record the contract, I should hesitate to hold this alone as fatal to plaintiff's lien." See, also, Wells v. Wood, 114 Cal. 255, 46 Pac. 96; Reid v. Clay, 134 Cal. 207, 66 Pac. 262. Compare Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

21 See Dougherty v. Henarie, 47 Cal. 9.

recovered in the courts of this state, at the rate of seven per cent per annum, and no greater rate, but such interest must not be compounded in any manner or form." Under this provision it is held that a judgment cannot draw more than seven per cent per annum, notwithstanding the fact that the security calls for a higher rate;[22] and it would seem that the same principle should apply to street assessments.

§ 243. **To Whom Payment may be Made.**—Payment may be made to the contractor, his assigns, or some person in his or their behalf, or to the street superintendent. Section 10 provides: "If any payment be made the contractor, his assigns, or some person in his or their behalf, shall receipt the same upon the assessment in the presence of the person making such payment, and shall also give a separate receipt if demanded. . . . . The said superintendent of streets is authorized at any time to receive the amount due upon any assessment list and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books in his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued." The owner is entitled to pay the person named in the warrant, in the absence of notice of the rights of any other person; and such a payment will operate as a discharge of the lien.[23]

§ 244. **Part Payment.**—It is proper for the contractor to receive part payment, and to state the amount in his return.

[22] Hill v. Eldred, 49 Cal. 398.

[23] Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278. See, also, Taylor v. Palmer, 31 Cal. 241.

A payment of a portion of the assessment does not, however, release any part of the lot assessed from the lien for the amount remaining unpaid. The lien is against the entire lot for the whole and every part of the assessment. Hence, a payment by one co-owner of a portion of the assessment does not release his interest in the land from the lien for the balance.[24] Where the property is assessed to unknown owners, and the amount is severable, the contractor may release the lien on a portion upon payment of its share of the assessment.[25]

§ 245. **Right of Tenant to Pay Assessment.**—Section 17 provides: "Any tenant or lessee of the lands or lots liable may pay the amount assessed against the property of which he is the tenant or lessee under the provisions of this act, or he may pay the price agreed on to be paid under the provision of section 13 of this act, either before or after suit brought, together with costs, to the contractor, or his assigns, or he may redeem the property, if sold on execution or decree for the benefit of the owner, within the time prescribed by law, and deduct the amount so paid from the rents due and to become due from him, and for any sums so paid beyond the rents due from him, he shall have a lien upon and may retain possession of the said land and lots until the amount so paid and advanced be satisfied, with legal interest, from accruing rents, or by payment by the owner." The purpose of this is evidently to make the tenant's right clear. As a general proposition, a tenant has a right to pay taxes, and deduct the amount from the rent.[1] This arises from the duty of the landlord to protect the property from a paramount title. Of course, payment of a void assessment can confer no right upon the tenant.

§ 246. **Reassessment—In General.**—Prior to 1889 it was held that in cases where the assessment was defective, the

24 Williams v. Bergin, 127 Cal. 578, 60 Pac. 164.
25 McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010.
1 See Taylor on Landlord and Tenant, sec. 341.

street superintendent might make a new assessment, and that there was no statutory limitation of time for its issuance. It was further held that if the original assessment was in conformity with law, the superintendent had exhausted his power, and until that assessment was legally vacated or set aside he had no authority to issue another.[2] In 1889 and in 1891, section 9 was amended to read in part as follows: "Whenever it shall appear by any final judgment of any court of this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of said street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof made to or recorded by said superintendent of streets, any person interested therein may, at any time within three months after the entry of said final judgment, apply to said superintendent of streets who issued the same, or to any superintendent of streets in office at the time of said application, for another assessment to be issued in conformity to law; and said superintendent shall, within fifteen days after the date of said application, make and deliver to said applicant a new assessment, diagram, and warrant in accordance with law; and the acting mayor shall countersign the same as now provided by law, which assessment shall be a lien for the period of two years from the date of said assessment, and be enforced as provided in section 7 of this act." Speaking of this amendment, the Supreme Court has said: "It must be assumed that the legislature intended thereby some change in the law as it previously existed, for if, notwithstanding the amendment, the superintendent can still issue a second assessment at any time and under any conditions, the amendment would cease to have any operative effect. But it is evident from the terms of the amendment

[2] See Himmelman v. Cofran, 36 Cal. 411; Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327; Wood v. Strother, 76 Cal. 547, 9 Am. St. Rep. 249, 18 Pac. 766.

that the object of the legislature was to limit the time within which a second assessment might be made, as well as to prescribe the conditions under which the superintendent would be authorized to issue it. . . . . The jurisdiction of the superintendent of streets is limited, and can be exercised only within the period of time therein named, and under the conditions therein expressed, and the final judgment of a court is made the sole evidence upon which the superintendent may determine whether these conditions exist."[3] It becomes important, therefore, to determine exactly what the statute requires.

§ 247. Same—Right Arises Only After Final Judgment. The contractor's right to a reassessment arises only after a final judgment against him. The Supreme Court has said: "It is no doubt true that for certain purposes an action brought in the Superior Court is to be deemed as still pending, although a final judgment has been rendered in said court, until the time for appealing to this court has expired, and that rule has been declared in the decided cases, principally, where a judgment of the Superior Court has been invoked as a bar to another action. But a judgment of the Superior Court, final in its nature, declaring an assessment void for informality, etc., is clearly within the meaning of the street law, where the words used are, 'any final judgment of any court of this state'; and this is certainly so where the plaintiff in such a suit, instead of appealing, has substantially abandoned his appeal by the act of applying for a new assessment."[4] And the finality of the judgment is not affected by the fact that certain fictitious defendants were not served, did not appear, and no judgments against them were entered.[5] The judgment referred to is not merely

[3] Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538. See, also, Gray v. Lucas, 115 Cal. 430, 47 Pac. 354; Westall v. Altschul, 126 Cal. 164, 58 Pac. 458.

[4] Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

[5] Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

a judgment declaring finally that the assessment is invalid. Thus, where the plaintiff in an action to foreclose the lien recovers judgment, which is reversed on appeal by the higher court on the ground that the assessment is invalid, such determination is not a final judgment which will entitle the plaintiff to a new assessment.[6] He must prosecute the action again in the Superior Court to a judgment against him. Absurd as such a requirement may be, it is said that the statute demands it.

§ 248. **Same—What Defects Authorize.**—A reassessment is authorized only where the defect is in the assessment, in the recording thereof, or in the warrant or in the recording thereof. "The statute does not authorize its issuance in a case where the plaintiff was defeated in an action upon the former one by reason of a defect or absence in the engineer's certificate, or upon the ground that no lien had been created

[6] Westall v. Altschul, 126 Cal. 164, 58 Pac. 458. Referring to this the court said: "It is certainly a very crude and, so far as I can see, a very unwise law. It would not necessarily appear by a final judgment that the suit was defeated on that ground rather than on some other objection made by defendant, and why, after the assessment had been finally adjudged void, should the plaintiff be required to prosecute his action to an inevitable judgment against himself before he is entitled to a new assessment? And yet it is so plainly written in the law, and the special limitation begins to run from 'the entry of said final judgment.' If the statute were less explicit, we should endeavor to conclude that the determination of this court, although a new trial was awarded, was such final adjudication. It certainly was final upon the only material matter—the validity of the assessment. But here we are precluded from applying such a rule, for plainly the assessment cannot be made until after the final judgment, and the plaintiff or his assignor did not dismiss the former suit, thereby acquiescing in the decision and making the determination end in a final judgment before the assessment. Until then we cannot say that the plaintiff did not hope, by new evidence, to show an assessment which would be valid. And the new assessment was not made within three months after the reversal of the judgment in the Supreme Court." The court construed the reversal of the judgment according to its legal effect, which is to vacate the judgment and leave the case standing for a new trial.

upon the property. The contractor could have refused to accept the assessment from the superintendent without the certificate, but, if he did accept it, and brought his action thereon and was defeated upon this ground, the statute does not authorize the issuance of another assessment. The legislature might have authorized the issuance of a second assessment in case of the failure to recover upon the ground of any defective document, but it has not done so, and we are not at liberty to add to the statute terms or conditions which the legislature has not seen fit to include therein."[7] Again, it is not authorized when the defect is a failure to return the warrant in time.[8] Moreover, it must appear by the judgment that the plaintiff was defeated because of such defect. "If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply. The facts, therefore, upon which the judgment is based must show the grounds upon which the suit was defeated, in order that it may be seen whether there is a right to a second assessment."[9] Inasmuch as a finding of facts is inappropriate when a nonsuit is granted, it would seem questionable whether the superintendent would be authorized to make a new assessment after such a judgment.[10]

§ 249. **Same—Payment by Some of the Owners Does not Affect Right.**—The fact that some of the owners have paid their assessments before the entry of the judgment determining the invalidity does not preclude the making of a second

7 Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538. We have already seen that, in general, the absence of an engineer's certificate is not fatal. (See ante, sec. 223.) If the plaintiff should be defeated on such ground, however, the principle stated in the text would prevent a reassessment. His only remedy would be an appeal to the higher courts.

8 City Street Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 332.

9 Gray v. Lucas, 115 Cal. 430, 47 Pac. 354.

10 Gray v. Lucas, 115 Cal. 430, 47 Pac. 354.

assessment. "Such payments would be regarded as payments in advance; and the contractor would not be allowed to collect the sums over again any more than the holder of a note who has received payment before it was due would be allowed to do so. If the contractor should refuse to discharge the lien of record, a court of equity is amply competent to afford the necessary relief. The fact that some have paid in advance can afford no protection to those who have not paid."[11]

§ 250. **Right to New Warrant upon Loss of Original.**—Section 10 provides "that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with the same effect as if the original had been so returned." This provision is vague. It does not specify what proof is necessary, nor does it expressly make it the duty of the superintendent to issue the duplicate. The legislature certainly did not intend to reward a contractor who loses his warrant by extending his time for making a return. Hence, it would seem that application for a duplicate must be made within the time limited for the return of the original warrant. Otherwise, there would be no limit to the time within which a return need be made, for a contractor could always extend the thirty day period by losing his warrant.

[11] Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766.

DIVISION 5.

APPEALS TO THE COUNCIL.

§ 251. In general.
§ 252. Right of contractor to appeal.
§ 253. When not necessary.
§ 254. When necessary—Improper acceptance of work.
§ 255. Same—Improper charges.
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§ 257. Effect of failure to appeal.
§ 258. Time of appeal.
§ 259. Form of appeal.
§ 260. Effect of appeal.
§ 261. Notice of hearing.
§ 262. Jurisdiction of the council.
§ 263. Conclusiveness of determination.
§ 264. Effect of failure to meet at time fixed.
§ 265. Appeal does not estop owners from contesting void assessment.

§ 251. **In General.**—Section 11 provides a remedy by appeal to the council for certain errors of the superintendent of streets. "The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council." This is a different proceeding from the petition of remonstrance provided for by section 3.[1] Its object is to correct

[1] See ante, sec. 112.

errors within the power of the council to correct. A stranger to the proceedings is not obliged to appeal.[2]

§ 252. **Right of Contractor to Appeal.**—The contractor, as well as the owner, is entitled to appeal from the assessment, if aggrieved. If he does not appeal, he is concluded by the assessment, and cannot have it otherwise corrected before judgment.[3] And it is probable that, if he fails to take advantage of this remedy, he cannot hold the superintendent of streets personally for negligence in making the assessment. The Supreme Court, interpreting a provision similar in most respects, said: "If he fails to avail himself of the means of protection afforded by the law, the loss in consequence of defects of the kind under consideration results as much from his own negligence, as from that of the superintendent. We are of opinion that the remedy for such defects is the one prescribed by the statute, and that the contractor cannot neglect to avail himself of the remedy provided, and then hold the officer liable for the result."[4] This does not mean that the owners may not have a remedy under section 22 for defaults of the superintendent, without a prior appeal.[5]

§ 253. **When not Necessary.**—An appeal is required only of persons who feel aggrieved "by an act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets." It is apparent that this remedy is given only to parties aggrieved by the acts of the superintendent of streets, and has no application to the precedent

2 Bassett v. Enwright, 19 Cal. 635.
3 Frick v. Morford, 87 Cal. 576, 25 Pac. 764.
4 Smith v. Cofran, 34 Cal. 310.
5 See post, sec. 335 ff.

acts of the council or board.[6] And it applies only to such defects in the action of the superintendent as can be corrected by the board. It does not apply to any act which makes the proceedings absolutely void. "The provision, in the latter part of section 11, that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void by reason of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief. Nor would the owner be estopped from presenting any such defects because he had appealed to the city council, and that body had denied him relief.[7] Their denial of relief may have been based upon the express ground that the matter appealed from was not such as they could remedy, and therefore they would decline to take any action. If, however, they had expressly determined that the assessment was valid and the previous steps regular, their decision would not have any binding force. Being a tribunal of limited jurisdiction, unless the facts conferring such jurisdiction existed, their action would be void, and it would be competent at any time to show that they had no jurisdiction to determine the question."[8]

[6] De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

[7] Manning v. Den, 90 Cal. 610, 27 Pac. 435; California Imp. Co. v. Moran, 128 Cal. 373, 60 Pac. 969.

[8] Manning v. Den, 90 Cal. 610, 27 Pac. 435. See, also, Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; Warren v. Chandos, 115 Cal. 382, 47 Pac. 132; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431; Dougherty v. Hitchcock, 35 Cal. 512; City Street Imp. Co. v. Taylor, 138 Cal. 364, 71 Pac. 446; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226.

Thus, it is not necessary to appeal when the assessment is void because the work was not completed in time: Mahoney v. Braverman,

§ 254. When Necessary—Improper Acceptance of Work. For matters coming within the scope of section 11, an appeal is the only remedy. Thus, it is held that the remedy of the owner for improper work, or for a failure to complete, or for an improper acceptance by the street superintendent is by appeal to the council.[9] "The act of examining, approving and accepting the work requires the exercise of judgment and is, in that respect, of a judicial nature. Yet these particular duties are not such as are usually devolved upon courts of justice. Although they partake of a judicial nature, they are a part of those duties, in the aggregate of a mixed character, which are always imposed upon the executive and legislative officers of local governments. If the proceedings are regular, so that the proper officers have jurisdiction to act, and they exercise their judgment upon the matters committed to their care in the several steps of the proceedings, their determinations are valid, and can only be reviewed in the mode appointed by law. . . . . Although the public in its corporate capacity is the party to the contract, yet the law is not unmindful of the subordinate interest of the lotholders upon whom the cost of the work

54 Cal. 565. Nor when the contract was entered into prematurely: Burke v. Turney, 54 Cal. 486. Nor when the contract does not correspond with the resolution of intention: McBean v. Redick, 96 Cal. 191, 31 Pac. 7. Nor when the resolution of intention does not properly describe the work: San Jose Imp. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859.

[9] Emery v. Bradford, 29 Cal. 75; Warren v. Riddell, 106 Cal. 352, 39 Pac. 781; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720 (only remedy for failure of work to comply with specifications is appeal); Lambert v. Bates, 137 Cal. 676, 70 Pac. 777 (only remedy where work not fully performed); Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127; San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72; Smith v. Hazard, 110 Cal. 145, 42 Pac. 465; Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943; Shepard v. McNeil, 38 Cal. 72; Cochran v. Collins, 29 Cal. 129; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Oak Hill Water Co. v. Gillette, 13 Cal. App. 605. But see McVerry v. Kidwell, 63 Cal. 246 (a decision under an earlier statute, where the court found that the contractor's conduct was fraudulent).

is to be in part assessed."[10] The superintendent's acceptance is a decision that the work has been done to the official grade,[11] and that the work has been done for the entire distance prescribed;[12] and hence an owner questioning such matters must appeal. Moreover, where the resolution excepts work already done, his acceptance is a declaration that the part not improved by the contractor had been already done to his satisfaction; and such a determination can be questioned only by an appeal.[13] The remedy given by section 11 does not prevent the owner from proceeding against the street superintendent under section 22.[14]

§ 255. **Same—Improper Charges.**—The necessity for an appeal in cases where improper charges are included within the assessment or where the assessment covers too much land depends upon whether the invalidity appears upon the face of the proceedings. "If the assessment includes expenses which under any circumstances might have been a charge upon the property assessed, and the alleged error is to be determined by matters outside of the assessment itself, the owner must first seek its correction by an appeal.[15] If, how-

10 Emery v. Bradford, 29 Cal. 75.

11 Warren v. Riddell, 106 Cal. 352, 39 Pac. 781. In this case the contractor had graded the street to a line entirely at variance with the official grade; and it was held that the owner's only remedy was an appeal.

12 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

13 San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

14 Goodsell v. Ashworth, 96 Cal. 397, 31 Pac. 261.

15 McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71. See, also, Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; Oak Hill Water Co. v. Gillette, 13 Cal. App. 605, 110 Pac. 316; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339.

Thus, if a lot is assessed for more than its proper proportion, and this does not appear on the face of the proceedings, the only remedy is by appeal: Wells v. Wood, 114 Cal. 255, 46 Pac. 96; Harney v. Benson, 113 Cal. 314, 45 Pac. 687; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Bates v. Hadamson, 2 Cal. App. 574, 84 Pac. 51; Himmelmann v. Hoadley, 44 Cal. 276. See, also, Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943;

ever, the assessment is void upon its face, it does not constitute an apparent lien upon the property, and as its invalidity is always apparent the owner is not 'aggrieved,' and is not required to seek its correction by an appeal, but may depend upon this inherent invalidity whenever an attempt is made to enforce it, or any right is asserted by virtue of its existence. An assessment is void upon its face if it purports to be for work which is not included in the contract upon which it is made, or which has not been authorized in the resolution of intention;[16] or if it appears from the diagram attached thereto to be upon lands which the statute does not make chargeable with the expense of the work,[17] or which lie outside of the district to be assessed.[18] The assessment is to be regarded as an entirety, and is equally void if it appears upon its face that a portion, or the whole of it, is for the expense of work which is not legally chargeable upon the property assessed,[19] or if the statute required a portion of the expense incurred to be assessed upon other property."[20] If merely the assessment is void, the contractor is not remediless. He may have the assessment corrected on appeal,[21] or, after judgment against him he may

Blair v. Luning, 76 Cal. 134, 18 Pac. 153. If improper incidental expenses have been included, an appeal is the only remedy: Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. 1143.

16 Donnelly v. Howard, 60 Cal. 291; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537; Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699; Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Gray v. Burr, 138 Cal. 109, 70 Pac. 1068. But see Frick v. Marford, 87 Cal. 579, 25 Pac. 764.

17 Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590. See, also, Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699.

18 Schumacker v. Toberman, 56 Cal. 508 (under old statute). See, also, Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Benson v. Bunting, 141 Cal. 462, 75 Pac. 59.

19 Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082.

20 Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339. As to the last point, see Diggins v. Brown, 76 Cal. 318, 18 Pac. 373. See, also, Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772.

21 Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327.

have a reassessment. Where the assessment is severable, so that the void part can be separated from the valid, it will be upheld to the extent that it is valid. There must be a separate demand for the valid part, however.[22]

§ 256. **Same—Improper Omission of Lots.**—The same principles apply to cases where a lot is improperly omitted from the assessment. If it appears upon the face of the assessment that the omission is improper, the assessment is void and no appeal is necessary.[23] If it does not appear on the face of the assessment, the only remedy is by an appeal.[24]

§ 257. **Effect of Failure to Appeal.**—It follows as a matter of course from what has already been said that a failure to appeal from a matter which the council has jurisdiction to hear and correct on appeal amounts to a waiver of the right to assert that defect in any action to enforce[25] or to restrain the enforcement of an assessment. This is, in fact, merely a statement of the proposition that an appeal must be taken, in different terms. A failure to appeal, how-

22 McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808; Ede v. Knight, 93 Cal. 165, 28 Pac. 860; Parker v. Reay, 76 Cal. 103, 18 Pac. 124. But where the valid and invalid parts are not severable, the whole assessment is void: Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537.

23 See ante, sec. 255. See, also, sec. 185.

24 Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. See, also, Dowling v. Altschul (Cal.), 33 Pac. 495.

25 This proposition is universally recognized: See Lambert v. Bates, 137 Cal. 676, 70 Pac. 777; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; Wells v. Wood, 114 Cal. 255, 46 Pac. 96; Harney v. Benson, 113 Cal. 314, 45 Pac. 687; Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; Smith v. Hazard, 110 Cal. 145, 42 Pac. 465; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Spaulding v. San Francisco Homestead Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; Dorland v. McGlynn, 47 Cal. 47; Chase v. Trout, 146 Cal. 350, 80 Pac. 80; Beaudry v. Valdez, 32 Cal. 269; Dyer v. Parrott, 60 Cal. 551; McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Oak Hill Water Co. v. Gillette, 13 Cal. App. 605, 110 Pac. 316.

ever, does not waive the right of the owner to proceed against the superintendent of streets and his bondsmen under the provisions of section 22.[1] And of course where no appeal is necessary, there is no waiver by failure to appeal.

§ 258. **Time of Appeal.**—The appeal must be made within thirty days after the date of the warrant. The words "date of the warrant" are interpreted to mean the date of the recording of the warrant.[2] Otherwise, the superintendent of streets might, by holding the warrant in his possession, deprive the owners of their right to appeal. The words are given the same construction as the same words in section 10, where it is provided that the return must be made within thirty days after the date of the warrant.

§ 259. **Form of Appeal.**—"The statute does not exact from persons objecting to an assessment the same strictness and precision in stating the objection, which would be required in a pleading at common law. On the contrary, the proceeding is intended to be summary, and all that the statute requires is that the objection be briefly stated in writing. In other words, the nature of the objection may be stated in general terms, without specifying minutely all the particulars."[3] Thus, in an early case, an appeal on the ground that grading had already been done failed to state that the appellants had obtained the necessary certificate from the city engineer, but it was held sufficient.[4] A signed document is sufficient as an appeal if it states that "the work is not being done in a first-class manner, and we ask your honorable body to investigate the matter before we are assessed for its costs. In fact, we hereby protest against paying for so poor a job."[5] Likewise, the following has

1 Goodsell v. Ashworth, 96 Cal. 397, 31 Pac. 261.
2 Cotton v. Watson, 134 Cal. 422, 66 Pac. 490.
3 Barber v. City and County of San Francisco, 42 Cal. 630.
4 Barber v. City and County of San Francisco, 42 Cal. 630.
5 Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.

been held sufficient: "The work is not being done in a proper manner, and we ask your honorable body to investigate the matter before we are assessed for its costs, and we hereby protest against paying for so poor a job."[6] Again, a statement that "we do hereby protest against the acceptance by your honorable body, of the street improvement work done upon said street, for the reason that said work has not been performed according to the specifications and terms of said contract," operates as a valid appeal.[7] From the foregoing, it is clear that the instrument need not be designated as an appeal, nor need it use the word in any part. The fact that the word "remonstrate" is used does not make the document a petition of remonstrance rather than an appeal. Thus, the following has been held a sufficient appeal: "The undersigned hereby respectfully remonstrate against the acceptance of contract for the paving of Channel street between Hunter and California streets, as I claim said contract has not been done according to specifications on file in the office of the street superintendent. My claim includes all curbing, bituminous rock paving, basalt block paving, concrete work, filling under sidewalks and relaying of the same."[8]

§ 260. **Effect of Appeal.**—The effect of an appeal is to suspend all action for the collection of the assessment until after its determination; and hence no action to foreclose the lien can be maintained by the contractor until after such determination.[9] The council has no power to dismiss the appeal without giving notice of a time for hearing.[10] The appeal is pending until it is passed upon by the council, after notice. Where no one appears at the time fixed, and no testimony is offered, the council may dismiss.[11] Such a dis-

6 Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.
7 Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.
8 Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.
9 Williams v. Bergin, 108 Cal. 166, 41 Pac. 287.
10 People v. O'Neil, 51 Cal. 91.
11 Mahoney v. Braverman, 54 Cal. 565.

missal, however, is in effect a determination by default. An objection by one owner may be taken advantage of by any other owner; and no action can be maintained as to any owner until all appeals have been passed upon.[12] All proceedings are suspended until that time. It is not necessary for the appellant or for any other owner to request the council to take action on an appeal.[13]

§ 261. **Notice of Hearing.**—"Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be published for five days."

The council cannot increase the assessment upon any lot without notice to the owner thereof, given in the manner provided in section 11. This notice must be given even though such owner may not have appealed from the assessment. "The act of the superintendent in making the assessment is in the nature of a judgment by a tribunal of special and limited jurisdiction. After its judgment has once been exercised its power is exhausted, and, in the absence of statutory authority for its revision, the judgment cannot be changed. By the original assessment the land of the owner is charged with a lien of a specified amount, and, if the amount of this lien is to be increased, it is essential that the owner shall have notice thereof, and have an opportunity to be heard thereon. This notice is in the nature of process by which the board of supervisors may acquire jurisdiction to act upon the appeal and change the assessment. It is the only means which the law has provided to warn the owner of the intended increase of the lien upon his property, and must be followed in order to effect such increase. The mode which the statute prescribes for a revision of the assessment is the measure of the power, and, unless that mode is

[12] Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.
[13] Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.

followed, any attempted revision will be nugatory. Where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with or the proceedings will be a nullity. . . . . In the absence of any provision in the statute for the mode of giving the notice it would be necessary that every person who might be affected by the appeal should receive personal notice of the matter appealed from, as well as of the time and place fixed for hearing the same. The provision that the notice shall be given by publication for five days merely changes the mode of giving the notice but does not change the character of the notice to be given. The publication of the notice takes the place of personal notice, but can have no greater effect as a notice than would a similar one if personally delivered to him who is to receive it. Although the statute merely declares the manner in which the notice shall be given, and does not indicate the persons who are to be notified; yet it is a rule of universal application in all proceedings by which a person's property is to be taken, or to be charged with a burden, that he shall have notice of the proceedings, and the notice which is here required to be given necessarily includes every one who is to be affected by the appeal. A notice which, by its terms, is limited to a portion of those who may be so affected cannot be held to extend to others who may be also interested in the appeal, and is not a compliance with the statute."[14] It is not necessary, however, that the notice name the parties to be notified. A notice, general in its terms, is sufficient.[15]

[14] Williams v. Bergin, 108 Cal. 166, 41 Pac. 287.

[15] Williams v. Viselich, 121 Cal. 314, 53 Pac. 807. The notice in this case was as follows: "Notice is hereby given that an appeal of John E. Magary, contractor for paving with basalt and curbing with granite curbing Washington street, from Hunter street to El Dorado street, in the city of Stockton, to the city council of said city from the assessment for such curbing and paving made by the street commissioner of said city, and from the diagram and warrant thereto attached, on the ground that some of the lots so assessed were assessed to the wrong

§ 262. **Jurisdiction of Council.**—By the terms of section 11, "upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council, and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto at their option."

The action of the council on an appeal is purely judicial. It is made a special tribunal to determine the conflicting claims of individuals. It is not to legislate or to use its judgment to promote public interests. The act being judicial, it follows that a final judgment entered upon an appeal cannot be vacated or set aside.[16] The statute does not provide for granting a new trial or a rehearing.[17] While the matter is still sub judice, no doubt the tribunal may reconsider its action, but when final judgment has been entered

persons, and for informalities of said assessment, diagram and warrant, will be heard by said city council at its regular meeting to be held at the courtroom of Department No. One of the Superior Court of San Joaquin county, California, on the twenty-eighth day of May, 1888, commencing at eight o'clock P. M. of that date, or as soon thereafter as same can be heard. Dated May 18, 1888. C. A. Campbell, Clerk of the City of Stockton."

16 Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312; Creed v. McCombs, 146 Cal. 449, 80 Pac. 679. See, also, Lambert v. Bates, 137 Cal. 676, 70 Pac. 777. In general, see City of Stockton v. Dahl (Cal.), 4 Pac. 369.

17 In Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312, the court said: "The general rule is that where special jurisdiction is conferred upon a court or board to determine certain specified controversies, and no provision is made for a review by such tribunal of its judgments, when it has once determined the matter its jurisdiction is exhausted."

the board is functus officio.[18] The written request of the appellants does not confer jurisdiction to reverse or reconsider.[19] The Supreme Court, after denying the right of the council to give life to an assessment after having set it aside, said: "Doubtless, under section 11 aforesaid, at any time after sustaining the appeal, the council, upon ascertaining to its satisfaction that the work was really done according to the contract, and finding the previously prepared assessment ready to its hand and correct in all respects, could have adopted it and ordered that it be issued as the assessment for the completed work; or it could have ordered that a new assessment be made and issued, and if in that case the street superintendent had redated and reissued the former one, it would have been valid."[20] Where the council has jurisdiction, the courts will not review its action on the ground that the relief granted was not based upon the objection made.[21] Upon ordering the work completed according to the contract, it may direct that it be done to its satisfaction and under its direction. In such a case, a certificate by the superintendent of streets, contradicting a prior certificate, to the effect that the work was not done under his direction, is immaterial.[22] The council cannot, on appeal or otherwise, ratify or make valid a void proceeding.[23] Where the council directs a new assessment, authority to make a new warrant and diagram is implied.[24]

§ 263. **Conclusiveness of Determination.**—The statute makes "all the decisions and determinations of the said city council . . . . final and conclusive upon all persons entitled to appeal under the provisions of this section as to

18 Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.
19 Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.
20 Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.
21 Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.
22 Hadley v. Dague, 130 Cal. 207, 62 Pac. 500.
23 See ante, sec. 253. See, also, Meuser v. Risdon, 36 Cal. 239.
24 Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

all errors, informalities, and irregularities which said city council might have remedied and avoided." In interpreting this, the Supreme Court has said: "The legislature did not intend by the above provision that the appeal should be prosecuted in a perfunctory manner, or should be a mere formality. By declaring that the determination of the council shall be 'final and conclusive,' it intended that that body should be the final tribunal for the determination of all questions that might be appealed to it, so far as such determination was of a question of fact, or depended upon evidence that might be presented in support of the appeal. This provision cannot be construed as authorizing a person merely to take an appeal to the council without presenting to that body sufficient evidence, or any evidence whatever, to support his appeal, and afterward seek to have the grounds of his appeal sustained before another tribunal and under additional or different evidence. Whether, if the council should overrule his appeal or dismiss the same by reason of its misapplication of law to the facts before it, or under a misconstruction of the law, its action could be elsewhere reviewed, need not be here determined; but in such a case it would be incumbent upon the party seeking the review to clearly present to that tribunal the questions of law which he claims to have been misconstrued or erroneously applied, and show that they have been presented upon the appeal to the council."[25]

[25] Lambert v. Bates, 137 Cal. 676, 70 Pac. 777. In regard to the point left undecided, the court cites Wormouth v. Gardner, 112 Cal. 506, 44 Pac. 806, a case dealing with the decision of the land office, where it is said: "It is an established rule of law that, upon the issuance of a patent by the United States, the decision of the officers of the land department upon all of the facts necessary to the issuance of such patent is, in the absence of fraud, mistake or imposition, conclusive, but that if in making this decision they have erred in the construction of the law applicable to the facts, or by any mistake of law have given to one the land which, upon undisputed facts, should have been given to his contestant, a court of equity will grant relief against such mistake by disregarding their erroneous rulings of law, and will decree that

§ 264. Effect of Failure to Meet at Time Fixed.—Section 54 provides: "Whenever in proceedings hereunder the time and place for hearing by the city council is fixed and from any cause the hearing is not then and there held or regularly adjourned to a time and place fixed, the power of the city council in the premises shall not be thereby devested or lost. The city council may fix a time and place for the hearing and cause notice thereof to be given by publication by at least one insertion in a daily, semi-weekly or weekly newspaper published and circulated in said city and designated by the council for that purpose, such publication to be at least five days before the date of hearing, and thereupon the city council shall have power to act as in the first instance."

§ 265. Appeal Does not Estop Owner from Contesting Void Assessment.—The fact that the owner has appealed to the council does not estop him from subsequently contesting a void assessment. The Supreme Court has said: "To avoid litigation and expense, the owners might properly ask the board to set aside the assessment, but we fail to see how an erroneous refusal to grant their application could create any estoppel against them. As well might it be said, if one against whom a void judgment had been entered, should ask the court to set it aside, and his application should be denied, that he would afterward be estopped from questioning the validity of the judgment."[1]

the person who has received the patent holds the same in trust for the one to whom it should have been issued. Errors of judgment, however, in reference to the weight of evidence or the credibility of witnesses, as well as the inferences or conclusions which the officers may draw from the testimony before them in contested questions of fact, are conclusive upon the courts."

[1] Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672. See, also, Mahoney v. Braverman, 54 Cal. 365; Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

DIVISION 6.

ENFORCEMENT OF THE ASSESSMENT.

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§ 266. In General.—The method of enforcing a lien for an assessment under the Vrooman Act is prescribed in section 12. A suit to foreclose, similar in most respects to suits to foreclose mechanics' liens, is provided for. The section says: "At any time after the period of thirty-five days from the day of the date of the warrants, as herein provided, or if an appeal is taken to the city council, as provided in section 11 of this act, at any time after five days from the decision of said council, or after the return of the warrant or assessment, after the same may have been corrected, altered or modified, as provided in said section 11 (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. . . . . Suit may be brought in the Superior Court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands, the owners thereof cannot, with due diligence be found, the service in each of such actions may be had in such

manner as is prescribed in the codes and laws of this state. . . . . In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the codes of this state." By the terms of the foregoing, summons must be served as in other cases.[1]

§ 267. **Nature of the Action.**—"An action for the foreclosure of the lien of a street assessment is not a proceeding in rem, except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action. It is not a proceeding wherein a judgment for the sale of the property will bind the entire world, or affect the interest therein of any owner except those who are made parties defendant in the action. There can be no proceeding in rem except it be authorized by statute, and in such a proceeding the res which is to be affected thereby is the defendant, and must be brought before the court either by seizure or by publication of notice. Unless notice of the proceeding is in some form given to the owner of the res and an opportunity afforded him to defend the same, a judgment for its sale would have the effect to deprive him of his property without due process of law. The lien of a street assessment—like any other tax—is to be enforced only in the mode and to the extent authorized by the legislature. In this state the legislature has authorized its enforcement by means of a suit in equity against the owner of the land; and in section 16 of the Street Improvement Act the owner is defined to be, for the purposes of that act, the person owning the fee, or in whom appears the legal title to the land by deeds recorded in the county recorder's office of the county. There is no provision that the land shall be made the defendant in such action, or that service

[1] See Fanning v. Foley, 99 Cal. 336, 33 Pac. 1098, where service was insufficient.

of process shall be made upon it. . . . . Under section 8 of the act, if the name of the owner is unknown to the superintendent of streets, the owner is to be designated in the assessment as 'unknown,' but it would not be contended that the contractor could select any person he might choose as the defendant in his action and bind the land by the judgment therein, as against its actual owner as defined in section 16."[2] The action being in equity, it follows that the parties are not entitled to a jury trial.[3]

§ 268. Procedure Does not Violate Constitutional Prohibition of Special Laws.—The procedure provided by section 12 does not violate the constitutional prohibition against special laws regulating the practice of courts of justice. "It is not necessary that a law shall affect all the people of the state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." The provisions of section 12 are applicable to all actions for the foreclosure of street assessment liens arising under the Vrooman Act, and are in force in all parts of the state. "That the legislature may prescribe different rules of procedure, as well in matters of pleading as of evidence, for different actions, is illustrated by what has been done in defining the form of pleading upon judgments and in other special actions, in requiring the pleadings in forcible entry and detainer to be verified, in denying a divorce upon the mere default of the defendant, in making a tax deed prima facie evidence of the regularity of the proceedings prior to its issuance, and in requiring a different form of

[2] Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278. In an earlier case it was said that the action is in personam, but the measure of satisfaction is the defendant's interest in the land: Wood v. Curran, 99 Cal. 137, 33 Pac. 774.

[3] Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

proof for the execution of a will from that of any other written instrument, as well as in numerous other instances."[4]

§ 269. **Mode Prescribed is Exclusive.**—The mode of enforcement prescribed in section 12 is exclusive.[5] "The collection of taxes belongs to the executive branch of the government, and can be assumed by the judiciary only under express legislative authority therefor. Courts may inquire into and determine the validity of the assessment or other proceedings, but unless the statute has declared it to be a lien it cannot adjudge it to be one, and if the statute has declared it to be a lien, and provided for its enforcement, its enforcement can be only in the mode provided by the statute. The right of a court of equity to adjudge that a lien exists against certain land carries with it the right to enforce such lien, but the rule is well recognized that a court of equity, as such, and in the absence of statutory authority therefor, has no jurisdiction to enforce a lien that is created by statute, and for whose enforcement the statute has provided a mode."[6]

§ 270. **Parties Plaintiff.**—The statute provides that the contractor or his assignee may sue in his own name. The city is not a proper party plaintiff.[7] Where the claim is assigned by way of security only, but the assignee is empowered to collect, he may maintain the action in his own

[4] McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71. See, also, Whiting v. Townsend, 57 Cal. 515; Richardson v. Tobin, 45 Cal. 30.

There is a dictum in People v. Central Pac. R. R. Co., 83 Cal. 393, 23 Pac. 303, to the effect that a statutory provision for a special form of complaint in an action to recover certain classes of delinquent taxes violates the constitutional prohibition against special laws regulating the practice of courts of justice. This was practically overruled in People v. Central Pac. R. R. Co., 105 Cal. 576, 38 Pac. 905.

[5] Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

[6] Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290.

[7] Dyer v. North, 44 Cal. 157.

name.[8] The complaint should show that the plaintiff is either the original contractor or his assignee.[9] An assignee may maintain a suit to foreclose against his assignor, for the action is not on contract.[10] Where the action is brought by but one of two co-owners of an assessment, an objection to the defect of parties is waived if not raised by answer.[11]

§ 271. **Parties Defendant.**—The statute makes the owner the only necessary party defendant. The owner is defined by section 16 to be "the person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as the executor, administrator, or guardian of the owner." All owners who appear as such of record must be made parties defendant.[12] The omission of one cotenant is a fatal defect. The statute does not say that the owner is the only proper party. It is a general principle that a judgment or decree binds only parties to the proceedings or pendente lite purchasers. A pendente lite purchaser is one who takes by purchase after the filing of a lis pendens. Hence it is necessary, in order to obtain a good title on foreclosure, to make all who have a record claim at the time of

8 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283. Compare Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081.

9 Bayo v. Lapidge, 52 Cal. 481.

10 Hendrick v. Crowley, 31 Cal. 471.

11 Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081.

12 Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162; Hancock v. Bowman, 49 Cal. 413; Clark v. Porter, 53 Cal. 409; Diggins v. Reay, 54 Cal. 525; Harney v. Applegate, 57 Cal. 205.

It follows that when an action is dismissed as to one owner no judgment can be taken against the others: Driscoll v. Howard, 63 Cal. 438; nor can judgment be entered against some of the owners before all are served with process: Diggins v. Ray, 54 Cal. 525.

the commencement of the action parties defendant.[13] It has been said that one who becomes the owner by purchase under a prior foreclosure after the commencement of the action is not a pendente lite purchaser and must be made a party defendant.[14] It has been held that executors of a deceased owner are not necessary parties defendant; that the heirs at law, even before distribution, are the only necessary parties defendant;[15] although it would seem, under the definition of owner given above, that the executors are proper parties. And it has been held that the action may be maintained against an executor without joining the heirs.[16] The mere fact that the person holding the legal title is in fact a mortgagee does not make it necessary to join any other defendant, when his deed is absolute.[17] Where certain defendants sued by fictitious names are alleged to have an interest in the property, it may be error to render judgment by default after a dismissal as to the fictitious defendants;

[13] Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

[14] Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

[15] Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662. In this case, the court said: "In support of his proposition that the executors are necessary parties defendant, appellant cites Hancock v. Bowman, 49 Cal. 413, and People v. Doe, 48 Cal. 561. The decisions in those cases were based upon the provisions of section 13 of the act of April 4, 1870, which required the action to be brought against 'the owners and all persons having an interest therein.' But by an act approved April 1, 1872, and apparently to avoid the necessity of making all parties having an interest in the property defendants in the action, it was provided (section 13) that the action might be brought against the owner of the land. . . . . It may be that, under these provisions, persons other than the heirs and devisees are proper parties to the action, and that their rights cannot be foreclosed unless they are made defendants; but as to that we express no opinion. It is sufficient to say that the defendant is the owner in fee, that he is the only necessary party, and that plaintiff is entitled, under this act, to a decree of foreclosure, whatever may be the rights of other parties interested, who are not joined as defendants."

[16] Parker v. Bernal, 66 Cal. 113, 4 Pac. 1090.

[17] Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119.

but if so, only the party against whom the judgment is rendered is entitled to relief.[18]

§ 272. **Joinder of Actions.**—The statute makes no express provision for joinder of several causes of action in one complaint. Hence the right to do so must depend upon the general provisions of the Code of Civil Procedure. The liability under a street assessment does not arise out of contract. Hence two actions cannot be joined under that provision of the code. It follows that two causes of action for enforcing two liens for two assessments made at different times and under separate contracts cannot be joined.[19] Such assessments clearly do not constitute one transaction. It would seem, however, that the assessment against several lots of the same owner, in one proceeding, is one transaction, and that the actions to foreclose on all the lots of one owner may be joined;[20] although each assessment constitutes a separate cause of action.[21] An interesting question may arise as to whether the plaintiff may join all the owners in one action, in order to prevent a multiplicity of suits. The question of the validity of the proceedings prior to the assessment is a common one; but inasmuch as the assessment may be valid as to some of the owners only, and inasmuch as each defendant has a right to set up individual defenses, it is probable that the single action is not maintainable.[22]

18 Worth v. Emerson, 3 Cal. App. 158, 85 Pac. 664.

19 Dyer v. Barstow, 50 Cal. 652.

20 See People v. Hagar, 52 Cal. 171; McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351. In Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027, several causes against the same owner were joined, but the question of the right to join was not raised.

21 McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924; Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027.

22 The whole question of equitable relief in order to prevent a multiplicity of suits is fully discussed in Pomeroy's Equity Jurisprudence, sections 243–275. See particularly, sections 251½ and 261, and notes to third edition. The California cases allowing a joinder of all stockholders in a suit to enforce stockholders' liability are not in point, for the Civil Code permits a joinder in such a case.

§ 273. Complaint—Allegations as to Conditions.—The complaint must allege the performance of all conditions which are precedent to the liability of the defendant.[23] "In actions upon contracts, a general allegation of performance of conditions precedent is declared sufficient by our statute. But a general allegation of the performance of conditions prescribed by a statute has not been so declared, and is not, therefore, sufficient. The same rule prevails as to judgments and determinations of courts, tribunals, boards, and officers of inferior or special jurisdiction. In favor of such the law intends nothing; hence, if the liability of the defendant depends upon them, the facts conferring jurisdiction must be specially alleged at common law; but under our statute, an allegation that the judgment or determination was duly given or made is declared sufficient."[24] A complaint which on its face shows the proceedings to be void for any reason does not state facts sufficient to constitute a cause of action.[25]

§ 274. Same—Pleading Facts in Statutory Form.—While it is customary to allege all the jurisdictional facts in detail, such allegations are not always essential. The Code of Civil Procedure provides that "in pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction."[1] This provision applies to actions to fore-

[23] Himmelman v. Danos, 35 Cal. 441; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Libbey v. Ellsworth, 97 Cal. 316, 32 Pac. 228. Thus, the complaint must allege that an assessment was made: People v. Eaton, 46 Cal. 100.

[24] Himmelman v. Danos, 35 Cal. 441.

[25] Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Crouse v. Barrows, 156 Cal. 154, 103 Pac. 894. See, also, California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

[1] Code Civ. Proc., sec. 456.

close street assessments. Thus, it has been held that an allegation that "on the twenty-fourth day of July, 1888, the city and county of San Francisco, deeming it necessary, duly gave and made its determination to order the work done," is, although not clearly expressed, sufficient without an allegation of the passing of a resolution of intention.[2] Likewise, an allegation that the board of supervisors "duly made and passed" a resolution setting an assessment aside is held to be a statement in legal effect that everything necessary to be done to give the resolution validity has been done.[3]

But "a pleading that any judgment is duly given and made means this, and no more than this: that the court had jurisdiction to render a judgment, but the judgment as rendered by the court may, in and of itself, be a nullity. Its voidness may appear upon its face, and, if so, it cannot form the basis of a cause of action. Or it may appear from the judgment itself that it confers no right of action upon the plaintiff." Hence where a pleader sets out a resolution of intention which on its face shows its insufficiency, the defect in the proceedings is not cured by an allegation that the resolution was duly given and made.[4] The advantage of setting out all the jurisdictional facts at length is that the defendant is obliged to deny specifically, and that the issue may thus be narrowed.

§ 275. Same—Must State Facts, not Conclusions of Law. It is a general principle applicable to all pleadings that the facts must be alleged and not conclusions of law, unless the statute expressly authorizes the pleading of a conclusion. We have already seen that the code authorizes the pleading

[2] Pacific Pav. Co. v. Bolton, 97 Cal. 8, 31 Pac. 625. See, also, Buckman v. Hatch (Cal.), 70 Pac. 221.

[3] Williams v. Bergin, 127 Cal. 578, 60 Pac. 164. As to the sufficiency of allegations of jurisdictional matters, see California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

[4] Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

of a judgment as "duly given or made"; and while this is a conclusion of law, it is permissible. But in matters not coming under that provision, the facts must be pleaded. Thus, an allegation that a prior assessment, diagram, warrant, and purported engineer's certificate were "never duly or properly or legally recorded" in the office of the superintendent of streets states a conclusion of law and is insufficient.[5] Whether the documents were properly or legally recorded is to be determined by the court upon facts shown in reference thereto, and the opinion of the plaintiff as to the effect of these facts cannot be substituted for the judgment of the court. He must point out the defect upon which he relies, in order that the court may pass upon it. Where an objection to a conclusion of law is not raised by demurrer, however, it may be waived.[6]

§ 276. **Same—Allegations as to City and Street.**—It is customary to allege that the city in which the work has been done is a municipal corporation and that the street improved is an open public street. The omission of such direct allegations, however, is not fatal, especially in the absence of a special demurrer. Thus, an allegation "that the city council of the city of Los Angeles, state and county aforesaid, passed a resolution of intention that New High street, in said city, from the north line of Franklin street to the south line of Temple street . . . . be paved and curbed," is sufficient without a direct allegation that the city of Los Angeles is a municipal corporation or that New High street is a public street therein;[7] for the court takes judicial notice that a city is a municipal corporation and that a public street is such. The court said, in upholding this: "When

[5] Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538. In general, see McBean v. City of San Bernardino, 96 Cal. 183, 31 Pac. 49.

[6] Pacific Pav. Co. v. Diggins, 4 Cal. App. 240, 87 Pac. 415.

[7] Bituminous Lime Rock Pav. Imp. Co. v. Fulton (Cal.), 33 Pac. 1117. See, also, City of Stockton v. Dahl (Cal.), 4 Pac. 369.

plaintiff, in its complaint, averred the passage of a resolution to pave and curb New High street, in said city, it was as comprehensive as the definition of the term 'street,' and was tantamount to an averment that it was an open public street."

§ 277. **Same—Description of Property.**—The complaint must describe the land with sufficient definiteness to enable the purchaser under a decree for its sale to obtain possession thereof.[8] It is only the lot assessed which is subject to the lien. Hence, the judgment, as well as the complaint, must be limited to the description found in the assessment.[9] Where the diagram contains a sufficient description, an allegation which describes the lots by metes and bounds, and refers to the diagram, is sufficient; but where the location of the streets is in doubt, a description which assumes the location and does not refer to the diagram is insufficient.[10]

§ 278. **Same—Allegations as to Contract.**—The complaint must set forth facts showing due execution of the contract.[11] This includes allegations showing that it was entered into within the time required by law. If it appears that it was entered into prematurely or after the time limited, and no legal excuse for delay is pleaded, the complaint does not state facts sufficient to constitute a cause of action.[12] As an excuse for delay, the complaint must allege that it was not caused by the neglect, refusal or failure of the contractor. The complaint must also show that the superintendent of streets fixed the time for commencement and completion. Where this provision is inserted in the contract,

8 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

9 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

10 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

11 Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310.

12 Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310; Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310.

it should be alleged with the statement of the terms of the contract.[13] Where it is not made a term of the contract, it should be separately stated. An allegation to the effect that the superintendent of streets fixed the time for commencement to be within fifteen days of the date of the contract and the time for completion to be within a specified number of days thereafter is sufficient.[14] The word "thereafter" will be construed to refer to the date of the contract.

§ 279. **Same—Terms of Contract.**—The contract must be set out in the complaint, either in haec verba or according to legal effect.[15] The complaint should show that it contains everything required by the statute. It is not necessary to set out the specifications at length. They are but a part of the contract, and therefore an averment that the plaintiff entered into a contract with the superintendent of streets for doing the work according to the specifications therein is sufficient.[16] Likewise, an allegation that the contractor agreed that he would do the work "in a good and workmanlike manner, and with the materials required by said specifications, which were also to be to the satisfaction of the superintendent of streets, and were to be furnished by the said party of the first part therein according to the said contract and specifications," is sufficient.[17]

13 Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310. Compare Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081. To the effect that it is not necessary for this stipulation to be included in the contract, see ante, sec. 166.

14 Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, 1080.

15 Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310.

16 California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. See, also, Greenwood v. Hassett (Cal.), 61 Pac. 173.

A statement to the contrary in Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 310, is not law: See Byrne v. Luning (Cal.), 38 Pac. 454. And even where it was intimated to be necessary to set out the specifications in full, it was said that the defect was cured by a failure to demur and by setting out the specifications in the answer: Girvin v. Simon, 116 Cal. 604, 48 Pac. 720.

17 Byrne v. Luning (Cal.), 38 Pac. 454.

§ 280. **Same—Allegation of Performance.**—The complaint must allege performance of the work. This may be done in general terms. Thus, an allegation "that the plaintiff did all the work in said contract mentioned and duly performed on its part in every respect said work according to the specifications and the terms of the contract," sufficiently avers its performance.[18] This is not a statutory averment of the performance of conditions precedent referred to in section 457 of the Code of Civil Procedure, which we have already seen does not apply to this class of cases.[19]

§ 281. **Same—Allegations as to Assessment, Warrant and Diagram.**—The assessment, warrant, certificate and diagram are made prima facie evidence of the plaintiff's right to recover. The effect of this provision as a rule of evidence is considered in a later section.[20] This states a rule of evidence, and not of pleading.[21] Hence, a pleader cannot merely allege the making and delivery of these documents and then rest upon the presumption. He must allege all matters necessary to show his right to recover, laying the presumption aside.[22] Where the assessment is to be levied by the front foot, it is not sufficient to allege that the street superintendent "proceeded to and did make an assessment upon the property benefited by said street improvement." The complaint should allege that the assessment was made in the terms prescribed by the statute.[23] An allegation that "the commissioner of streets made in the manner and form

18 California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. See, also, Byrne v. Luning (Cal.), 38 Pac. 454.

19 See ante, sec. 273.

20 See post, sec. 297 ff.

21 Himmelman v. Danos, 35 Cal. 441; Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546; Burke v. Turney, 54 Cal. 486.

22 Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546. Under some of the earlier statutes this method of pleading was allowed: Doan v. Houghton, 75 Cal. 360, 17 Pac. 426.

23 Miller v. Mayo, 88 Cal. 568, 26 Pac. 364.

required by law an assessment upon the lots and lands fronting thereon, each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work" is sufficient.[24]

§ 282. **Same—Miscellaneous Allegations.**—Where the statute requires a notice to be published by order of the council, the complaint must allege such an order;[25] but this is not necessary when the statute does not require such an order.[1] It should show that the bids were filed within the time allowed by law; and where the allegation sets forth a date of filing later than the legal time, the defect is not cured by the offering in evidence of the bid bearing an earlier date, unless evidence of the date of filing is offered.[2] It is necessary to allege a proper demand. Where the assessment is made to unknown owners, the complaint should show a public demand upon the premises.[3] Where the owner is named, but no personal demand has been made, the complaint must allege that neither the defendant nor his agent could conveniently be found.[4] Under an old statute providing that the action shall be brought against owners and all persons having any interest in the property, it was held that the complaint must allege that the defendants are owners or have some interest.[5]

24 Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081.

25 Himmelmann v. Townsend, 49 Cal. 150.

1 Dyer v. North, 44 Cal. 157; Himmelmann v. Haskell, 46 Cal. 66; City of Stockton v. Dahl (Cal.), 4 Pac. 369. As to sufficiency of allegation of posting, see Miller v. Mayo, 88 Cal. 568, 26 Pac. 364.

2 N. P. Perine Contracting Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

3 Engelbert v. McElwee, 122 Cal. 284, 54 Pac. 900.

4 McBean v. Martin, 96 Cal. 188, 31 Pac. 5.

5 City and County of San Francisco v. Doe, 48 Cal. 560. See, also, City of Santa Barbara v. Huse, 51 Cal. 217. To the effect that title may be litigated, see Taylor v. Donner, 31 Cal. 480. It was also held that the complaint must show that plaintiff is the contractor or the assignee of the contractor: Bays v. Lapidge, 52 Cal. 481.

On the other hand, in the absence of a special demurrer it is not necessary to allege that a posting was conspicuous;[6] nor is it necessary to allege the terms of the agency of the person who made the demand nor that he had been authorized to make it.[7]

§ 283. **Same—Need not Negative Matter of Defense.**—It is not necessary that the complaint negative a matter of defense nor that it allege facts anticipatory of such a defense.[8] Thus, where the complaint sets out a resolution of intention to do certain work where not already done, it is not necessary to allege that the work had not been already done in front of the defendant's property.[9]

§ 284. **When Defective Complaint Cured by Verdict.**—In some cases a defective complaint is cured by a judgment. "The doctrine upon this subject is founded upon the *common law*, and is independent of any statutory enactments. The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is *cured by verdict*. The expression *cured by verdict* signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven

6 Williams v. Bergin, 127 Cal. 578, 60 Pac. 164; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

7 Williams v. Bergin, 127 Cal. 578, 60 Pac. 164.

8 Perine v. Lewis, 128 Cal. 236, 60 Pac. 442, 772.

9 Perine v. Lewis, 128 Cal. 236, 60 Pac. 442, 772.

at the trial."[10] It is necessary that evidence be admitted without objection upon the omitted fact. If such evidence is admitted without objection, the defect is cured.[11] If, however, such evidence is not offered, the mere fact that the court finds for the plaintiff will not cure the defect.[12]

§ 285. **Pleadings as to Continuance of Lien.**—Section 9 provides that the lien shall continue for two years after the date of the recording of the assessment, warrant, and diagram. This has been treated as a statute of limitation, although there is no express decision of the higher courts so holding. As we have already seen, if the action is commenced in time, the lien continues although judgment is not rendered until after the expiration of two years.[13] Where it appears upon the face of the complaint that the action has not been commenced in time, the defect may be reached by a demurrer specifying that the action is barred by lapse of time;[14] and, possibly, it may be reached as well by a general demurrer. Where the defect does not appear on the face of the complaint, it cannot be reached by demurrer;[15] but if my contention, as stated in the next section, is correct, such defect must always appear on the face of the complaint unless the facts are falsely stated.

§ 286. **Same—Comment.**—In my opinion the provision limiting the lien to two years does not establish a statute

[10] Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081, quoting from Chitty on Pleading.

[11] Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081.

[12] N. P. Perine Contracting Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

[13] Randolph v. Bayue, 44 Cal. 366; Dougherty v. Henarie, 47 Cal. 9; Himmelman v. Carpentier, 47 Cal. 42; Dorland v. McGlynn, 47 Cal. 47. See, also, ante, sec. 227.

It does not continue, however, as to persons not parties to the action: Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

[14] Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877.

[15] Williams v. Bergin, 116 Cal. 56, 47 Pac. 877.

of limitations. Strictly speaking, a statute of limitations bars the remedy only. In this case, however, the lien absolutely ceases and terminates at the end of two years. Not only is the remedy barred, but the right terminates as well.[16] Where the limitation is made a part of the right created, it inheres in it, so that there is no right of action independent of the limitation.[17] And it is held that in such cases the complaint must show that the condition has been fulfilled and that the right exists. Hence, it is not necessary to plead that the action has not been brought in time, for unless the complaint shows that it is in time, it does not state facts sufficient to constitute a cause of action.[18] Of course, if the complaint states facts showing the action to be brought within the time, the defendant must deny such allegations, for otherwise he would admit the facts. If the foregoing principles are applicable here, it would seem clear that the plaintiff must allege facts showing that the lien is in existence at the time of the commencement of the action; and he can do this only by showing that the period of two years has not elapsed since the accrual of the

[16] It seems to me that this is the clear meaning of the language. If the lien is to exist for two years, the only fair inference is that it is to cease at the expiration of that time. It certainly is not intended that any disability of the owner, or his absence from the state, shall relieve the contractor of his duty to enforce within the statutory period. He is given a lien for a specified period, and after the lapse of that period his lien ceases.

The case of Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. 681, is not in conflict with the principles here laid down. That was a case interpreting section 1190 of the Code of Civil Procedure, which provides that after a certain specified period a mechanic's lien shall cease to exist. The court held that a mechanic's lien is created by the constitution, and that therefore the legislature could not declare that it should cease to exist. Accordingly, the provision was interpreted as a statute of limitation. There is no such constitutional restriction in regard to street assessments.

[17] See 19 Am. & Eng. Ency. of Law, 2d ed., p. 150.

[18] See 25 Cyc., p. 1403, and cases there cited. The rule is there stated broadly that "where the statute operates, not merely on the remedy, but also extinguishes the right of action, it need not be pleaded."

lien. It follows that a complaint which does not contain such allegations does not state facts sufficient to constitute a cause of action, and should be held insufficient on general demurrer. It has been held that a judgment cannot be collaterally attacked upon the ground that the action was not commenced in time.[19]

§ 287. **Answer—In General.**—The general rules of pleading relating to answers are applicable to answers in actions to foreclose street assessment liens. A failure to deny an allegation of fact contained in the complaint is an admission thereof. Thus, where the complaint alleges that the bid was signed, and the answer is silent on the point, the defendant cannot object to the sufficiency of the bid on the ground that it was not signed.[20] In general, a defect in the preliminary proceedings may be reached by a specific denial.[21] Matters which cannot be so reached ordinarily constitute affirmative defenses, which must be specially pleaded.[22] Such a plea must state the facts constituting the defense. An answer which is in form the statement of a mere conclusion of law is insufficient. Thus, an allegation that the superintendent of streets did not make the

19 Crane v. Cummings, 137 Cal. 201, 69 Pac. 984.

20 City Street Imp. Co. v. Rontet, 140 Cal. 55, 73 Pac. 729.

21 Burke v. Turney, 54 Cal. 486; City and County of San Francisco v. Eaton, 46 Cal. 100. In Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934, the court said: "Assuming that, in an action to foreclose the lien of a street assessment, it is competent for the defendant to show that the work contracted for has not been done, or that the specifications for the work have been manifestly disregarded, such a defense must not only be alleged in the answer, but must also be supported by evidence at the trial." Inasmuch as the proposition assumed is not law, the statement is a mere dictum; and if it is interpreted as meaning that defenses of that nature must be affirmatively pleaded, its correctness is doubtful.

22 Thus, where the defendant desires to take advantage of a nonjoinder of parties plaintiff, not appearing upon the face of the complaint, he must set up the facts in his answer: Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081.

assessment in the manner or form prescribed by law is, in the absence of allegations setting forth the particulars in which it is defective, a mere conclusion of law and insufficient.[23] Of course, matters which, under the rules of substantive law, do not constitute a defense to the action should not be set up in the answer.[24] It has been stated generally that the defendant may set up any defect in the proceedings which affects the jurisdiction or which renders the proceedings void, and which could not be corrected by appeal to the council.[25] A denial of ownership on information and belief is sufficient in the absence of a motion to strike out.[1] There is no objection to pleading inconsistent defenses.[2]

§ 288. Same—Denial of Allegations as to Assessment, Warrant and Diagram.—If the defendant desires to attack any of the proceedings prior to the assessment, he should deny the allegations as to the assessment, warrant and diagram, or at least some of them. These documents, as we shall see, are prima facie evidence of the regularity of the prior proceedings and of the right of the plaintiff to recover. When they are properly alleged in the complaint and are not denied by the answer, it is not necessary for the plaintiff to introduce any evidence whatsoever in order to make out a prima facie case.[3] And this remains true although the answer may deny specifically certain of the allegations in regard to the prior proceedings. Thus, in one case the defendant denied that the resolution of inten-

23 Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408. See, also, Spaulding v. Wesson, 84 Cal. 141, 24 Pac. 377.

24 Thus, it is no defense that the contractor has worked his men ten hours per day: Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908.

25 City of Stockton v. Creanor, 45 Cal. 644. In general, see Donnelly v. Howard, 60 Cal. 291.

1 Harney v. McLeran, 66 Cal. 35, 4 Pac. 884.

2 Westall v. Altschul, 126 Cal. 164, 58 Pac. 458.

3 Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546.

tion was duly or at all passed, that the clerk printed for the required time a notice inviting sealed proposals, that the board opened the bids or awarded any contracts for the work, that plaintiff was the lowest bidder, and that the superintendent entered into any contract with the plaintiff, but failed to deny the allegations as to the assessment, warrant, and diagram. It was held that plaintiff's prima facie case was made out by the admissions of the answer and that the burden thereupon devolved upon the defendant to overcome it.[4]

§ 289. **Same—When Defendant must Set Out His Interest.**—As we have already seen, it is necessary to make all who have record claims to the property at the time suit is commenced parties defendant. A customary allegation as to those who are not owners is that the "said defendants have or claim to have some interest in the premises." Under such an allegation, it was held in an early case that such defendants, if they have any interest and desire to defend, must set it out in the answer.[5]

§ 290. **Estoppel.**—Ordinarily, the doctrine of estoppel cannot be invoked to prevent an owner from setting up the invalidity of the proceedings. We have already seen that there cannot be an extension of time for completion by estoppel.[6] Likewise, it is held that a claim of estoppel cannot be sustained to prevent the setting up of other defenses, especially in the absence of notice.[7]

§ 291. **Fraud as a Defense.**—It is questionable whether fraud in the proceedings may be set up as a defense. It is well settled that fraud without injury gives no right to

4 Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21.

5 Himmelmann v. Spanagel, 39 Cal. 389.

6 See ante, sec. 172. See, also, Heft v. Payne, 97 Cal. 108, 31 Pac. 844.

7 Peck v. Bernard, 12 Cal. App. 558, 108 Pac. 55.

relief.[8] And it has been held that a side agreement between the contractor and certain owners providing for a rebate, if fraudulent, in general works no injury.[9] "That the work was more than half done under a private contract, to which defendant was not a party, before any steps were taken to let a public contract, and that plaintiff went on and completed the work, and after its completion the party who had taken the public contract assigned it to plaintiff, does not constitute fraud per se."[10]

§ 292. **Counterclaim not Allowed.**—The defendant cannot set up a counterclaim against the contractor for damages to the property caused by the manner in which the work was done. A counterclaim is allowed in two cases: (1) where it is a cause of action arising out of the same transaction set forth in the complaint; (2) where the complaint states a cause of action on contract, any other cause of action arising on contract may be set up.[11] An action to foreclose a street assessment is not an action on contract, so the second case is clearly inapplicable.[12] The assessment is the transaction out of which the cause of action arises. A counterclaim for damages does not arise out of the assessment, nor out of the proceedings upon which it is based. Hence it does not come within the first case.[13] Moreover, the action is for the collection of a municipal tax "levied by the corporation upon certain property, to defray the expenses of the improvement of a street adjacent to the property. The origin, obligatory force and whole nature

8 See ante, sec. 176.

9 See ante, sec. 176.

10 Conniff v. Kahn, 54 Cal. 283.

11 Code Civ. Proc., sec. 438.

12 Himmelmann v. Spanagel, 39 Cal. 389.

13 Himmelmann v. Spanagel, 39 Cal. 389. The owner cannot set up that the contractor made an oral agreement to take land in payment: Perine v. Forbush, 97 Cal. 305, 32 Pac. 226.

To the effect that a cross-complaint for damages is not permissible, see Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879.

of a tax is such that it is impossible to conceive of a demand that might be set off against it, unless expressly so authorized by statute."[14] Upon the same principles, the defendant cannot set up a counterclaim for breach of a private contract.[15]

§ 293. **Amendment of Pleadings.**—The general rules relating to amendments of pleadings apply to these proceedings. Thus, the court may, in its discretion, refuse to permit an amendment which is evasive.[16] The withholding of leave to amend in sustaining a demurrer to a complaint will not be held error unless it appears either that the party has made an application to amend, or that he could amend so as to obviate the objection upon which the demurrer depends.[17] In dismissing as to fictitious defendants, it is not necessary to file an amended pleading. The complaint may be amended by striking out from the caption the names of fictitious defendants, or defendants against whom the plaintiff does not desire judgment.[18] And even this is not absolutely essential. A recital in the judgment that the action had been dismissed as to defendants sued by fictitious names, together with a finding that the defendant was the owner, are sufficient to show the amendment.[19]

14 Himmelmann v. Spanagel, 39 Cal. 389.

15 San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72. When the action is brought by an assignee, the defendant cannot set up a counterclaim against the contractor, of which the assignee had no notice: Himmelmann v. Reay, 38 Cal. 163.

16 Shepard v. McNeil, 38 Cal. 72. Where defendants admit ownership in their answer, it is not an abuse of discretion to refuse leave to amend to deny ownership: Harney v. Corcoran, 60 Cal. 314.

17 Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.

18 Doane v. Houghton, 75 Cal. 362, 17 Pac. 426. The court said: "This method of amending a pleading cannot be commended. It is irregular, and such mutilations are not only slovenly, but dangerous." Where such an amendment is made, the defendants may amend their answers to set up that the defendants named are not the sole owners: Harney v. Applegate, 57 Cal. 205.

19 Belser v. Allman, 134 Cal. 399, 66 Pac. 492.

§ 294. **Burden of Proof.**—The burden of proof in the first instance is upon the plaintiff. When he makes a prima facie case, however, by introducing the statutory evidence, the burden of going forward with the evidence shifts to the defendant; and the plaintiff need introduce no further evidence until the defendant has overcome his prima facie case.[20] It was held in an early case, under a similar statute, that when the defendant shows facts which deprive the council of jurisdiction, the burden of proving that jurisdiction was not lost is upon the plaintiff. Thus, where the defendant proves a majority protest which operates to stay proceedings for six months, and the record shows a new proceeding begun within that time, the plaintiff has the burden of proving that the property owners petitioned for the work.[21] Such a petition will not be presumed because of the general presumption of the regularity of official proceedings.

§ 295. **What must be Proved.**—The evidence must support and prove all the material allegations of the complaint. Under the Vrooman Act, this is ordinarily accomplished by introducing the statutory prima facie evidence. In the absence of such evidence, it is necessary to prove the facts separately. Thus, it has been held necessary to prove proper publication of a notice of award,[22] and authority for

20 San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Belser v. Allman, 134 Cal. 399, 66 Pac. 492; Williams v. Bergin, 129 Cal. 461, 62 Pac. 59; Pacific Pav. Co. v. Mowbray, 127 Cal. 1, 59 Pac. 205; Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21.

Under an earlier statute it was held that the plaintiff had the burden of proving that the defendants were the owners of the property: Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162.

21 Dougherty v. Harrison, 54 Cal. 428.

22 Shepaid v. Colton, 44 Cal. 628.

such publication.[23] Where ownership of the property is denied, it must be proved.[24]

§ 296. **Facts Judicially Noticed.**—The courts take judicial notice of the incorporation of a city,[25] and of its officers and their official signatures.[1] They also take judicial notice of streets, of their relation to each other, and of the direction in which they run.[2] They will not, however, take judicial notice that a space set apart on a map for a street is correctly located upon the ground, nor of the boundary of such a street. Neither can courts take judicial notice of the existence of a street that has been opened or adopted by a municipal ordinance, without proof of the passage of such ordinance.[3]

§ 297. **Assessment, Warrant and Diagram as Prima Facie Evidence—In General.**—The statute provides that "the said warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." This provision does not violate any constitutional provision.

[23] Donnelly v. Tillman, 47 Cal. 40.

[24] City of Santa Barbara v. Huse, 51 Cal. 217; Harney v. McLeran, 66 Cal. 34, 4 Pac. 884; Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162.

[25] Bryan v. Abbott, 131 Cal. 222, 63 Pac. 363.

[1] Himmelmann v. Hoadley, 44 Cal. 213.

[2] Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Brady v. Page, 59 Cal. 52; Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908; Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590. See, also, Whiting v. Quackenbush, 54 Cal. 306.

The courts will judicially notice that a crossing upon which work has been done is part of a public street; Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908.

[3] Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

It is competent for the legislature to prescribe rules of evidence for the trial of actions. Statutes which make a document prima facie evidence of the regularity of official proceedings in reference thereto, or which cast the burden of proof in an issue upon either party to the action, are within the constitutional power of the legislature.[4] And this provision does not violate the constitutional prohibition against special laws regulating the practice of courts of justice.[5] It states a rule of evidence, and not of pleading.[6] It is a general rule applicable to all cases, and not merely to actions to foreclose. Thus, one who sets up a street assessment as an encumbrance in a suit affecting real property may establish a prima facie case by such evidence.[7]

§ 298. **Same—Operation and Effect.**—We have already seen that unless the answer denies the averments of the complaint as to the assessment, warrant, and diagram, the plaintiff need offer no evidence to make out a prima facie case.[8] The admission in the answer of facts which, under the statute, constitute prima facie evidence, is equivalent to proof of those facts. Where the answer raises the issue, the plaintiff establishes his prima facie case by introducing the documents referred to. This evidence, however, is not conclusive. The defendant may introduce evidence to show that there is no right of recovery, and may thus overcome the presumption arising from the statute.[9] The prima facie

4 McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034. The rule of evidence may be changed after the action has been commenced: Himmelman v. Carpentier, 47 Cal. 43. For a full discussion of the validity of such statutes, see monographic note, 36 Am. St. Rep. 682.

5 McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71. And see ante, sec. 268.

6 See ante, sec. 281.

7 Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278.

8 See ante, sec. 288; Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21; Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546.

9 Belser v. Allman, 134 Cal. 399, 66 Pac. 492; Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585;

case can be overcome, however, only by evidence showing some defect in the proceedings which is fatal to the right to recover.[10] Inasmuch as the statute makes the evidence sufficient to establish the right to recover, it follows that it does away with the necessity for proof of all the other steps in the proceedings, both prior and subsequent. There is a dictum in one case to the effect that these documents make a prima facie case only as to prior matters, and not as to subsequent.[11] This dictum, however, is not supported by any of the decisions, and seems clearly wrong. The statutory evidence makes it unnecessary to show that the council had jurisdiction to commence proceedings. Thus, it is prima facie evidence that the width and grade of the street had been officially established.[12] I have enumerated in a note a few of the matters which have been specifically held to be proved by the prima facie evidence.[13]

§ 299. **Same—Evidence Which Does not Overcome.**—The prima facie case is not overcome by evidence that a protest has been filed, unless it is shown that it was signed by a

Flinn v. Strauss, 4 Cal. App. 245, 87 Pac. 414. In general, as to right to introduce evidence to show no valid assessment, see Doane v. Barber (Cal.), 9 Pac. 89.

[10] Pacific Pav. Co. v. Mowbray, 127 Cal. 1, 59 Pac. 205 (evidence not sufficient to establish fact of majority protest); Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432 (not overcome by evidence that resolution of intention was not entered in full in minutes of board, but was merely filed, numbered and referred to); Williams v. Bergin, 129 Cal. 461, 62 Pac. 51; Dowling v. Hibernia Savings & Loan Soc., 143 Cal. 425, 77 Pac. 141 (facts practically the same as in Edwards v. Berlin, supra). It is overcome by evidence showing that the contract was prematurely made: Burke v. Turney, 54 Cal. 486; and that neither the contract nor the contractor's bond had been properly executed: Manning v. Den, 90 Cal. 610, 27 Pac. 435. The presumption is not affected by unexplained delay: Williams v. Bergin, 129 Cal. 461, 62 Pac. 59.

[11] Witter v. Bachman, 117 Cal. 318, 49 Pac. 202.

[12] Blanchard v. Ladd, 135 Cal. 212, 67 Pac. 130.

[13] That a demand was made: Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; and that it was proper: Ede v. Knight, 93 Cal. 159, 28 Pac. 860. That the contractor had fulfilled his contract to the satisfaction

majority of the owners;[14] nor by evidence that the resolution of intention was not entered in full in the minutes of the council, but was merely filed, numbered and referred to;[15] nor does the absence of a corporate seal on the contract rebut the presumption of authority;[16] nor is such authority rebutted by evidence that there was no express resolution of the board of directors authorizing the contract, where it also appears that it was executed by a general manager acting under a general authority.[17] Where jurisdiction depends upon the fact that blocks on both sides of the improvement have been graded, the prima facie case is not overcome by evidence showing slight variations in grade in those blocks.[18] Evidence, of course, is limited

of the superintendent of streets: Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; Ede v. Knight, 93 Cal. 159, 28 Pac. 860; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127. That the work was completed within the legal time: Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. That a bid was filed in time: Williams v. Bergin, 129 Cal. 461, 62 Pac. 59. That special specifications had not been required by the council: Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426.

That resolution ordering work had been published: Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943; Jennings v. Le Roy, 63 Cal. 397. That notice had been posted: Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943; Jennings v. Le Roy, 63 Cal. 397. That notice of award had been published: Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943; Jennings v. Le Roy, 63 Cal. 397. That publication was proper: Himmelman v. Carpentier, 47 Cal. 43. That the person who executed the contract on behalf of the contractor had authority to do so: Reid v. Clay, 134 Cal. 207, 66 Pac. 262. That the contract had been recorded: Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

It will not be presumed that the warrant was delivered to the contractor prematurely: Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173.

14 Pacific Pav. Co. v. Mowbray, 127 Cal. 1, 59 Pac. 205.

15 Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141.

16 City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916. See, also, San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2.

17 Reid v. Clay, 134 Cal. 207, 66 Pac. 262. It is held that after the work is completed a property owner cannot question the power of attorney under which the contract was signed: McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885.

18 Fanning v. Bohme, 76 Cal. 149, 18 Pac. 158.

to material issues. Thus, evidence is not admissible to show that the work has not been done according to the contract, where it has been accepted by the superintendent of streets and no appeal has been taken to the council.[19] Nor is evidence of private unperformed contracts admissible, for such defaults constitute no defense.[20]

§ 300. **Same—What Documents Necessary.**—The express terms of the statute make the warrant, assessment, certificate, diagram, and affidavit of demand and nonpayment together, prima facie evidence. From this alone, the fair inference would be that all these must be offered in evidence before the presumption arises. We have seen, however, that the later cases hold that a certificate of the engineer is not essential to the validity of the proceedings, except possibly in the single instance mentioned in the ninth subdivision of section 7.[21] The question then arises as to whether the other documents, without the certificate, will make a prima facie case where no certificate has been filed. Giving the statute a liberal construction, it would seem that the other documents should be sufficient. To hold otherwise would be to penalize the contractor for no fault of his. It would seem that he cannot compel the making of a certificate which the statute does not compel the engineer to make. On the other hand, it is competent for the legislature to make a nonessential prima facie evidence; and it may be argued that inasmuch as the legislature has defined what shall constitute such evidence, the courts cannot allow less.

§ 301. **Same—How Proved.**—The statute does not prescribe how the assessment, warrant, and diagram shall be proved. In the absence of such direction, it would seem

[19] Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426. See, also, Emery v. Bradford, 29 Cal. 75.

[20] San Francisco Pav. Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72.

[21] See ante, sec. 223.

that they may be proved in the same manner as other official documents. The code authorizes proof of such documents either by the original or by a copy certified by the legal keeper of the original.[22] The plaintiff must offer competent evidence of every portion of the substituted proofs.[23] The assessment, warrant and diagram constitute one document, and, of course, are introduced together. The certificate and affidavit may be separate documents, although they are frequently attached to the assessment. When separate, they may be introduced in evidence separately.[24] Recording of the assessment is essential to its validity. The statute, however, does not in terms require evidence of recording as a prerequisite to the admission of the documents in evidence; and it is probable that the documents themselves raise the presumption that they have been recorded.[25]

§ 302. **Same—Documents must be Valid on Their Face.**—The assessment, warrant, and diagram constitute prima facie evidence only when regular on their face. It is obvious that a document which shows its own invalidity cannot be evidence of a right to recover. And the fact that the evidence is admitted without objection does not give it any greater effect.[1]

22 Code Civ. Proc., sec. 1918.

23 Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417. In this case the court said: "But for this provision it would have been incumbent upon the plaintiff to establish every act of the municipality and its officers which is required in order to create the lien of the assessment. If, instead of so doing, the plaintiff would avail himself of the statutory privilege to establish his right of recovery by the prima facie evidence, he must offer competent evidence of every portion of the substituted proofs." But, of course, it is not necessary to offer any evidence of prior proceedings: McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71.

24 Gray v. Lucas, 115 Cal. 430, 47 Pac. 354. See, also, Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

25 Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500.

1 Witter v. Bachman, 117 Cal. 318, 49 Pac. 202. Although this case seems wrong in holding that the documents do not constitute prima facie evidence of the regularity of subsequent proceedings, it is clearly right on the point to which it is here cited.

§ 303. **Records as Evidence.**—Section 18 provides: "The records kept by the superintendent of streets of said city, in conformity with the provisions of this act, and signed by him, shall have the same force and effect as other public records, and copies therefrom, duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any citizen wishing to examine them, free of charge."[2]

§ 304. **Evidence That Records Do not Show Fact.**—The fact that the records do not show a certain fact may be proved by the testimony of one who has examined the records. The Code of Civil Procedure provides that oral evidence of the contents of a writing is admissible "when the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."[3] Accordingly, it is held that the testimony of a deputy clerk that there had been no other resolution of intention passed for the same work is admissible to prove that negative.[4] The negative could be proved otherwise only by introducing the voluminous records of the proceedings of the council. Proof of what the records do show cannot be made by a certificate purporting to give only a part or an abstract of the record.[5] Nor is a certificate not provided for evidence of the facts it recites.[6]

§ 305. **Right to Contradict Records by Parol.**—Records of the council and of the superintendent of streets cannot, in

[2] See Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530. Affidavit of person making demand is prima facie evidence of authority: Whiting v. Townsend, 57 Cal. 515.

[3] Code Civ. Proc., sec. 1855, subd. 5.

[4] Pacific Paving Co. v. Gallett, 137 Cal. 174, 69 Pac. 985.

[5] Obermeyer v. Patterson, 130 Cal. 531, 62 Pac. 926.

[6] See Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537.

general, be contradicted by parol evidence. Thus, where the records of a board of supervisors show that its clerk was directed to advertise awards as required by law, parol evidence is not admissible to show that the publication was not ordered by the board.[7] But parol evidence is admissible to show that what is claimed to be a record is not in fact a record.[8] Where the superintendent of streets accepts work, he cannot subsequently contradict the record thereof by an indorsement stating that in fact the work was not done under his direction.[9] Parol evidence that a record was not made on the day it is dated does not contradict it, and is admissible.[10]

§ 306. Street Assessment Need not be Presented to Executor for Allowance.—It would seem clear that it is not necessary to present a claim for a street assessment to the executor or administrator of a deceased owner. The Code of Civil Procedure requires that "all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever";[11] but this applies only to claims arising upon contracts.[12] We have already seen that the liability under the street assessment proceedings does not arise upon contract. It has been held that where the work is commenced prior to the death of the owner, but the assessment is not levied until after, no presentation is necessary.[13] This comes within the usual

7 Dorland v. McGlynn, 47 Cal. 47.

8 Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589.

9 Hadley v. Dague, 130 Cal. 207, 62 Pac. 500.

10 Gately v. Irvine, 51 Cal. 172.

11 Code Civ. Proc., sec. 1493.

12 Hardin v. Sin Claire, 115 Cal. 460, 47 Pac. 363.

13 Thus, in Hancock v. Whittemore, 50 Cal. 522, the board of supervisors adopted a resolution of intention May 3, 1869. The owner died March 9, 1870. The assessment was made June 6, 1870. (The statement that it was made in 1860 is clearly a clerical error.) The court said: "An assessment for the improvement of a street is a municipal tax,

rule as to liabilities arising after death and during the course of administration. It has also been held that where a mortgagee pays a street assessment, by virtue of authority contained in his mortgage, after presentation of the mortgage claim, no further presentation is necessary.[14]

§ 307. **Decree.**—Section 12 provides: "The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order said premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." It is apparent that the decree in these cases must be in the main similar to decrees in ordinary cases of foreclosure. It must describe the property to be sold sufficiently to identify it as the same property described in the assessment.[15] Where the action is brought to enforce liens on several lots, the judgment must state the amount for which each lot is liable, and order the sale of each, or so much thereof as may be necessary to satisfy such amount and costs.[16] No judgment can be rendered until all the necessary parties are before the court.[17] And a judgment cannot bind parties whose rights are of record but who are not joined in the action.[18]

§ 308. **Provision for Attorney's Fee—Constitutionality.**—Section 12 provides: "And in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable costs as attorney's fees, but not any percentage upon said recovery. And

and the property owner is brought into relations with the proceedings which are initiated by the resolution of intention, only when the tax is levied; that is to say, when the assessment is made and issued." See, also, People v. Olvera, 43 Cal. 492.

14 German Sav. & Loan Soc. v. Hutchinson, 68 Cal. 52, 8 Pac. 627.

15 Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

16 Brady v. Kelly, 52 Cal. 371.

17 Diggins v. Reay, 54 Cal. 525; Hancock v. Bowman, 49 Cal. 413. See, also, Clark v. Porter, 53 Cal. 409.

18 Wood v. Curran, 99 Cal. 137, 33 Pac. 774.

when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor." This provision is constitutional. A similar provision in the mechanics' lien law has been held unconstitutional, the court saying: "A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, *the distinction is not founded on constitutional or natural differences,* is clearly violative of the constitutional provisions" guaranteeing the equal protection of the laws and prohibiting special legislation affecting proceedings in courts of justice.[19] The provision in the Vrooman Act is upheld on the ground that the distinction is founded on natural differences. A street assessment is, in reality, a tax. "It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose upon the taxpayer penalties for noncom pliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, including reasonable attorneys' fees, cannot be doubted. There is no distinction in principle in this regard between ordinary taxes and local assessments for improvements, under such statutes as our Street Improvement Act. The assessment, it is true, is one in favor of the contractor to whom the contract for the improvement has been let by the public authorities, but it is one laid by virtue of the power of the state to tax, and the

[19] Builders' Supply Depot v. O'Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A., N. S., 909, 11 Ann. Cas. 712. See, also, Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983; Merced Lumber Co. v. Bruschi, 152 Cal. 372, 92 Pac. 844. As to the general proposition, see Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 4 L. ed. 666.

contractor may properly be regarded as the agent of the state in the matter of the enforcement of the tax against the assessed property. The obligation resting on the property assessed to answer for this tax is as clear and positive as is the duty of a taxpayer to pay the ordinary tax. The nature of the proceedings is such that the expense of collecting the tax on property delinquent, if not recoverable against such property in the proceeding to enforce the tax, would fall in part on those who voluntarily pay their assessments, since contractors in bidding upon street work would be compelled to include in their estimates an additional amount sufficient to indemnify them against the probable further expense in this regard. Such expense should equitably be borne only by the property as to which such proceedings are rendered necessary by the delinquency of the owners. It would seem that the legislature should have the power to provide for the payment of such additional expense by the property whose owners are responsible therefor."[20]

§ 309. **Same—Lien.**—The statute does not, in so many words, declare that the attorney's fee shall be a lien upon the land; but such is the clear effect.[21] No personal judgment is allowed. Hence, if it were not a lien upon the land there would be no way of enforcing it. The statute contemplates a separate fee for each suit brought. Thus, where an owner is assessed for several lots and is sued for the liability on each separately, the plaintiff is entitled to an allowance for counsel fees in each action.[22] The statute does not contemplate more than one fee in each suit, however. Hence, where several causes against one owner are joined in one complaint, there can be but one allowance.[23]

[20] Engebretsen v. Gay, 158 Cal. 30, 109 Pac. 880, 28 L. R. A., N. S., 1062. In general, see 62 Am. St. Rep. 174, note.

[21] Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

[22] Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351.

[23] Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027; McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 204.

§ 310. No Deficiency Judgment.—The Vrooman Act makes no provision for a personal liability for assessments; and a provision for personal liability would be unconstitutional if provided for.[24] It follows that the judgment must be satisfied by a sale of the property assessed. A deficiency judgment is not authorized.[25]

§ 311. Effect of Decree on Pendente Lite Purchaser.—"The rule of the common law that a purchaser pendente lite of the subject of the controversy took as a volunteer or intruder and in subordination to the judgment thereafter rendered in the action is not in force in this state. In lieu thereof, section 409 of the Code of Civil Procedure authorizes the plaintiff in any action affecting the title to real property to file in the office of the county recorder of the county in which the property is situated a notice of the pendency of the action, and declares that 'From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action.' The general rule is that one not a party to a suit is not affected by the judgment; the exception at common law is, that a pendente lite purchaser, though not a party, was so affected; the qualification of the doctrine made by our statute is, that such purchaser is not affected unless notice of such lis pendens be filed with the recorder."[1] These rules as to the necessity of recording a lis pendens apply to actions to enforce street assessments.[2] We have already seen that if the action is commenced in time the lien continues

24 See ante, sec. 18. See, also, Taylor v. Palmer, 31 Cal. 240.

25 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278; Heft v. Payne, 97 Cal. 108, 31 Pac. 844; Manning v. Den, 90 Cal. 610, 27 Pac. 435; Gillis v. Cleveland, 87 Cal. 216, 25 Pac. 351. See, also, Taylor v. Palmer, 31 Cal. 240; Randolph v. Bayue, 44 Cal. 366; Gaffney v. Gough, 36 Cal. 104; Coniff v. Hastings, 36 Cal. 292; Guerin v. Reese, 33 Cal. 292, 70 Am. Dec. 390; Beaudry v. Valdez, 32 Cal. 269.

1 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

2 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

until judgment and execution. The lien does not continue after the expiration of two years, however, as against a pendente lite purchaser, unless a lis pendens has been filed.[3]

§ 312. **New Trial and Appeal.**—In general, the ordinary rules as to new trial and appeal in civil actions apply to actions to foreclose a street assessment. Thus, it is held that a finding of fact will not be disturbed where the evidence is conflicting.[4] A new trial may be granted upon any of the usual grounds. Thus, it may be granted upon the ground of surprise.[5]

Where a judgment includes improper charges, severable in their nature, the appellate court may, by consent of the plaintiff, modify the judgment by striking out the improper part, instead of remanding the case for a new trial.[6]

§ 313. **Sale—Time of.**—The sale must be made within five years from the date of the judgment. The fact that the plaintiff has been enjoined from enforcing the judgment does not extend the time. It follows that the court has no authority to order a sale after that time; and such a sale will not carry title.[7]

§ 314. **Same—Manner of Making.**—The sale is to be made "as in other cases of the sale of real estate by the process of said courts." "The mode of sale includes the officer by whom the sale is to be made, as well as the notice to be given and the place where it is to be made. The sale of real estate under the process of courts is not required to be uniform in all cases, and section 187 of the Code of Civil Procedure provides that in the exercise of its jurisdiction, 'if the course

3 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.
4 City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.
5 City Street Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 232.
6 Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772.
7 Dorland v. Smith, 93 Cal. 120, 28 Pac. 812.

of proceeding be not specifically pointed out, the court may adopt any suitable process or mode of proceeding which may appear most conformable to the spirit of the code'; and section 12 of the Street Improvement Act provides that that act shall be liberally construed to effect the ends of justice. By section 682 of the Code of Civil Procedure real estate which is to be sold in satisfaction of a money judgment is to be sold under a writ of execution directed to the sheriff of the county. Section 684 provides that, if the judgment requires the sale of property (real or personal), it may be enforced by a writ 'directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.' Under section 726, upon a judgment for foreclosure of a mortgage upon real property, the court may appoint a commissioner to sell the encumbered property. The proceedings for the foreclosure of a street assessment are quite analogous to those for the foreclosure of a mortgage upon real property, and, as no mode is specifically pointed out for the sale of real property estate under the judgment therein, it cannot be held that the appointment of a commissioner to sell the property in question was beyond the jurisdiction of the court, or even erroneous. The fact that the provision of section 726 authorizing the court to appoint a commissioner to sell the property was enacted at a later date than the provision in the Street Improvement Act does not render it inapplicable.''[8]

§ 315. **Title of Purchaser.**—We have already seen that a lien of a street assessment is prior to all other liens except those for general taxation.[9] It follows that a purchaser at a sale under foreclosure of such a lien takes the title free from all claims under mortgages.[10] The purchaser holds neither under the prior owner nor under the plaintiff.

8 Crane v. Cummings, 137 Cal. 201, 69 Pac. 984.

9 See ante, secs. 229–231.

10 Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119.

Hence, no priority can be obtained by a mortgagee by reason of the failure of an assignee of a certificate of sale to record the assignment. Thus, in one case, a street contractor, B, recovered judgment against an owner and purchased at the sale. Thereafter he assigned his certificate of sale to M, who failed to record the assignment. Thereupon a mortgagee sued to foreclose his lien, making B a party but not M. B made default. It was held that the judgment did not affect M.[11] The purchaser's title, however, is subject to rights of others who were not parties to the action. Thus, a purchaser under a judgment for a prior lien is entitled to priority where the lienholder was not made a party to an action to foreclose a subsequent lien, although judgment and sale for the second lien preceded judgment for the first.[12]

§ 316. Rights of Purchaser from Owner "Subject to Street Assessments."—A purchaser who is not made a party to the action and has no notice by lis pendens is not affected by a provision in his deed that it is "subject to any existing lien for street work." Upon this, the Supreme Court has said: "The evident purpose of this clause in her conveyance was to relieve her from any liability by reason of the implied covenant against encumbrances. The principle which renders a clause in the conveyance of land whereby the grantee assumed the payment of an existing mortgage or other lien thereon available to the holder of the lien is, that he thereby takes the place of his grantor in reference to the obligation secured by the land, and creates an equity in favor of the mortgagee by which the latter may enforce the obligation against him to the same extent that he can

11 Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119. Section 722 of the Code of Civil Procedure providing that in suits to foreclose mortgages only persons whose titles or liens appear of record need be made parties, applies only to those holding of or from the mortgagor, and a purchaser at a sale for street assessment or tax is not within that class.

12 Brady v. Burke, 90 Cal. 1, 27 Pac. 52. See, also, Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599.

enforce it as against his grantor. The obligation thus assumed by him is, however, only such obligation as exists against his grantor, and is simply an agreement for his indemnity. It can be enforced only by foreclosure, and is limited to the amount for which a deficiency judgment can be docketed after the sale of the mortgaged premises. If there is no personal liability on the part of his grantor, there can be no deficiency judgment rendered, and consequently the rule has no application. As there is no personal liability for street assessment there can be no deficiency judgment in an action for its foreclosure." [13]

[13] Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

DIVISION 7.

PROCEDURE FOR REPAIR OF STREETS.

§ 317. In general.
§ 318. Constitutionality.
§ 319. Same—An exercise of police power.
§ 320. Duty to repair.
§ 321. Notice to repair.
§ 322. Same—Who may serve.
§ 323. What work may be required.
§ 324. Procedure for awarding contract.
§ 325. Manner of enforcing liability.
§ 326. Right to prescribe penalties.
§ 327. Right to pay expense out of treasury.

§ 317. In General.—The Vrooman Act provides a complete scheme for repairing streets which are in a defective condition. Section 13 makes it the duty of the superintendent of streets to require property owners to make necessary repairs upon the highway fronting their property. Upon the failure of the owner after ten days' notice to enter upon the performance of the work, the street superintendent is authorized to do so. Sections 14, 15, and 17 provide methods for enforcing the liability. Section 22 makes it the duty of the street superintendent to see that the laws and regulations relating to the public streets are carried into execution. Section 23 imposes a liability upon the property owner for injuries occasioned by defects in the street fronting his property, "if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice thereof to the said superintendent of streets." It will be noticed that the procedure is very different from that prescribed for making ordinary improvements.

§ 318. Constitutionality.—A similar provision in the Consolidation Act, applicable to San Francisco, was upheld in

an early case. The court said: "Some provision being necessary for repairing the streets, the mode by which this is done, if it be uniform and equal in its operation, must be left to legislative discretion. This duty of repairing the streets is in the nature of a public burden or tax, and we do not see that the rule adopted applying to all the streets of a municipality is not as near an approximation to uniformity as could well be attained. Absolute justice in the operation of human laws is impossible; there is no rule, however just in its general working, which has not its exceptional instances of hardship; and especially in the results of the taxing power is this incurable infirmity of laws to secure exact and equal justice to all those upon whom they operate apparent. No tax law could ever stand if subjected to a rigid test on the score of uniformity. All we can expect is a general equality of operation; and we think that this is secured by this act. Regarding this obligation as creating a tax to the extent of the needed repairs, which the legislature had a right to impose, and the giving of the action to the contractor as merely the remedy to enforce it, we think that the judgment of the court below on the facts was right. If an unreasonable contract were made, or unreasonable repairs required, or advantage were taken by fraud or otherwise, the case might be different."[1] Treated as an ordinary local assessment, this is in conflict with the rule laid down in a later case to the effect that "an attempt by the legislature to compel each lot upon a street to pay the whole expense of grading and paving along its front cannot be maintained, because, while there is an apparent uniformity, the measure of equality required by the constitution is entirely wanting";[2] although it is probable that this latter case is no longer law.

§ 319. **Same—An Exercise of Police Power.**—These provisions may possibly be sustained upon the ground that

[1] Hart v. Gaven, 12 Cal. 476.

[2] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677.

they are a proper exercise of the police power of the state. In construing a statute requiring the owners to remove snow from sidewalks in front of their property, the Supreme Court of Massachusetts said: "It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class. It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them. If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics, or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit shall by a general and equal law be required to do it. Supposing a by-law should require every inhabitant who keeps a cart, truck or other team, or a coach or other carriage, to turn out himself or send a man, with one or more horses, after each heavy fall

of snow, to assist in leveling it. Although other citizens would derive a benefit, yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it, on the ground of inequality."[3] It may be argued that this is a peculiar rule applicable to sidewalks alone; but it has been applied to cleaning streets as well.[4] Our Supreme Court has not directly passed upon the point, although it has assumed the validity of the statute in several cases; and, as we have already seen, has upheld it in a case in which the matter was not fully discussed. It seems to me, however, that it requires too great an extension of the police power to cover this provision. According to the interpretation placed upon the statute, the superintendent of streets can practically require the work to be entirely done over. I can see no reason why such work should not come within the general rules relating to special assessments.

§ 320. **Duty to Repair.**—Section 13 provides: "When any portion of any street, alley, or public place in said city shall be out of repair or needing reconstruction, or in a condition to interfere with the public convenience in the use thereof, it shall be the duty of the superintendent of streets to notify

[3] Goddard, Petitioner, 16 Pick. (Mass.) 504, 28 Am. Dec. 259. There is a conflict of authority on this, however. Sustaining the validity of similar ordinances, see Helena v. Kent, 32 Mont. 279, 80 Pac. 258; Carthage v. Frederick, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178. On the other hand, see Gridley v Bloomington, 88 Ill. 554, 30 Am. Rep. 566; Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640.

In the Gridley case, the court said: "It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fines or penalties, as in the ordinance under which defendant was fined. Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. . . . . Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements."

[4] See Reinken v. Fuehring, 130 Ind. 382, 30 Am. St. Rep. 247, 30 N. E. 414, 15 L. R. A. 624.

the owner of any lot or portion of a lot, fronting on the portion of such street, alley, or public place, so out of repair or needing reconstruction, to repair or reconstruct such portion of said street, alley, or public place, to the center line of said street, alley, or public place, in front of the property of which he is the owner, or to repair the sidewalk in front of such property in case such sidewalk shall need repair or reconstruction, and he shall state in such notice what work is required to be done, and what materials shall be used in said work and how the same shall be done."

At common law there is no duty cast upon the abutting owner to repair the street. Hence, the duty can be cast upon him only in the manner prescribed by the statute.[5] It is made optional with the street superintendent.[6] In the absence of notice, the owner is not liable for injuries to third persons occasioned by the defective condition of the street.[7]

§ 321. **Notice to Repair.**—It follows from what has already been said that no duty to repair arises until after notice has been given as required by the act.[8] By the terms of section 13, the notice must specify what work is required to be done, how the same is to be done, and what material shall be used. Inasmuch as the proceeding is in invitum, it would seem that the notice must at least substantially comply with these requirements. It would seem that the work should be so clearly specified and described as to leave no doubt as to where and how it should be done. The notice must be in writing, and this implies that it must be signed.[9] Prior to 1911, the notice might be served by being delivered to owners, occupants, or their agents, personally, or by

[5] Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760; Eustace v. Jahns, 38 Cal. 3.

[6] Eustace v. Jahns, 38 Cal. 3.

[7] Martinovich v. Woolsey, 128 Cal. 141, 60 Pac. 760.

[8] Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760; Eustace v. Jahns, 38 Cal. 3.

[9] See In re Central Irr. District, 117 Cal. 382, 392, 49 Pac. 354.

being left on the premises. The statute did not in terms require any effort to make personal service. Service in a manner other than that prescribed is not sufficient. Thus, an averment that the defendants "had notice posted on the part of the city and county of San Francisco, and was advised to repair the same," is insufficient to show a compliance with this section.[10] The 1911 amendment, however, would seem to require a personal service.

§ 322. **Same—Who may Serve.**—Section 19 provides who may serve notice. It reads as follows: "Notices in writing which are required to be given by the superintendent of streets, under the provisions of this act, may be served by any person, with the permission of the superintendent of streets, and the fact of such service shall be verified by the oath of the person making it, taken before the superintendent of streets, who, for that purpose, and for all other purposes, and in all cases where a verification is required under the provisions of this act, is hereby authorized to administer oaths, or other person authorized to administer oaths, or such notices may be delivered to the superintendent of streets himself, who must also verify the service thereof, and who shall keep a record of the fact of giving such notices and proof of service when delivered by himself personally, and also of the notices and proof of service when delivered by any other person."

§ 323. **What Work may be Required.**—The statute authorizes the superintendent to require the repair or reconstruction, or both. In interpreting section 25, the Supreme Court held that "it would be in violation of a proper construction of the term 'repair,' to hold that it included an original improvement of the street, or work of a different character from that previously done thereon."[11] In con-

10 Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760.

11 Santa Cruz R. P. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.

nection with the word "reconstruction," however, it is given a broader meaning. Thus, in interpreting a similar provision in the San Francisco charter, it was held that the superintendent of streets may direct owners to repair a plank sidewalk by constructing an artificial stone or bituminous rock sidewalk.[12] This conclusion is reached partly on the ground that the statute authorizes the superintendent of streets to specify the materials. In my opinion this decision goes too far. If carried to its logical conclusion, it permits the superintendent to order a new pavement whenever an old and inferior one is out of repair. The result is that an improvement of magnitude can be done without the ordinary formalities, and the owner can be deprived of his rights to protest and appeal. In practically all cases in which a street has once been paved the street superintendent would have arbitrary power. Moreover, such a construction would seem to be in conflict with the provisions of section 25.

§ 324. **Procedure for Awarding Contract.**—Section 13 further provides: "If said repairs or reconstruction be not commenced within ten days after notice given, as aforesaid, and prosecuted to completion diligently, the said superintendent of streets may under authority from said city council let a contract for the performance of such work. He shall post notice at his office for two days inviting bids for the doing of said work of repair or reconstruction, and the contract shall be awarded by him to the lowest bidder, and a contract in writing shall be entered into with the successful bidder. Upon the completion of said repairs or reconstruction to the satisfaction of said superintendent of streets, he shall make and deliver to said contractor a certificate to the effect that said repairs or reconstruction, or both, have been properly made, and state what amount is payable by each owner for the same, which certificate shall be recorded in the

12 Heath v. Manson, 147 Cal. 694, 82 Pac. 331.

office of said superintendent of streets in a book kept for that purpose, and all owners of property in front of which such improvement shall have been performed, shall be deemed to have notice of the contents of the record thereof. The contractor may make demand for the amount due by serving written notice upon the owners, referring to the certificate so recorded, and if the contractor be not paid on demand, he shall have the right to sue each owner for the amount due and payable from each respectively, and the said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for the work and materials and of the right of the contractor to recover for the same in such action, and the amount so due and payable shall be a first lien upon the respective lots, pieces or parcels of land against which it may be charged, and shall have the same effect as the lien hereinbefore provided for in section nine of this act and may be enforced in the same manner." The proceeding is summary; but it would seem that all the statutory prerequisites must be fulfilled before any lien can be created. In outline, the procedure is as follows: (1) A notice in writing must be served upon the owner. (2) If the owner does not commence work within the time limited, the council must pass a resolution authorizing the street superintendent to proceed. Whether this authority may be general is questionable; but the safer procedure is to have a special resolution in each case. (3) The superintendent must conspicuously post in his office for two days a notice inviting bids for the work. It would seem that the notice should be sufficient to enable contractors to bid intelligently. It should describe the work to be done. (4) The contract must be let to the lowest bidder. It is to be noted that this does not say the lowest "responsible" bidder. There is no provision for re-advertising. (5) A written contract must be executed. The form and terms of the contract are not prescribed. (6) Upon completion of the work to the satisfaction of the street superintendent, he must issue a certificate to the effect that

the work has been properly done, and that the charge is reasonable, and that he has accepted the work.

§ 325. **Manner of Enforcing Liability.**—The manner of enforcing the liability is prescribed in section 14, which reads as follows: "If the expenses of the work and material for such improvements after the completion thereof, and the delivery to said contractor of said certificate be not paid to the contractor so employed, or his agent or assignee, on demand, the said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant for the amount contracted to be paid; and said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the said superintendent of streets in a book kept by him in his office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien, the same as provided in section 9 of this act, and may be enforced in the same manner." This provision is indefinite. It would seem that a demand is a prerequisite to a suit, but the nature of the demand is not prescribed. A personal demand is certainly sufficient, but it is questionable if a public demand upon the premises is sufficient in the absence of express authorization. It is possible, however, to argue that the word, in the absence of other definition, must be held to mean the same as in section 10. Moreover, it is uncertain as to what property is affected by the lien. Section 13 requires notice to be served on owners or agents of owners of lots or portions of lots fronting on the portion out of repair on the side of the street nearest which the defect is. Presumably such lots or portions of lots are affected by the lien. But what is the meaning of "lot"? It would hardly seem that the legislature intended to bind only the portion actually fronting on the repair; although that is a possible construction. Nor would it seem that any division

into lots as shown by a map of record is referred to, for there may be several such maps with different subdivisions. It seems to me that it must be construed to be a lien upon all of the adjoining frontage of the owner. In other words, the word "lot" means the owner's whole parcel fronting on the street. The diagram in the note will illustrate my meaning.[18] The lien is to be "the same as provided in section 9." It would seem to follow that it lasts for two years from the time it accrues. It would seem probable that the lien accrues when the certificate is recorded. The statute purports to authorize a suit against the tenant. It is certainly questionable whether it is within the power of the legislature to make the tenant personally liable; and it seems to me beyond question that the lien cannot be foreclosed as against the owner in an action to which the tenant alone is a defendant. Section 17 authorizes the tenant to pay the assessment, but this is merely the general rule as to the right of a tenant, and imposes no liability if the assessment is void.

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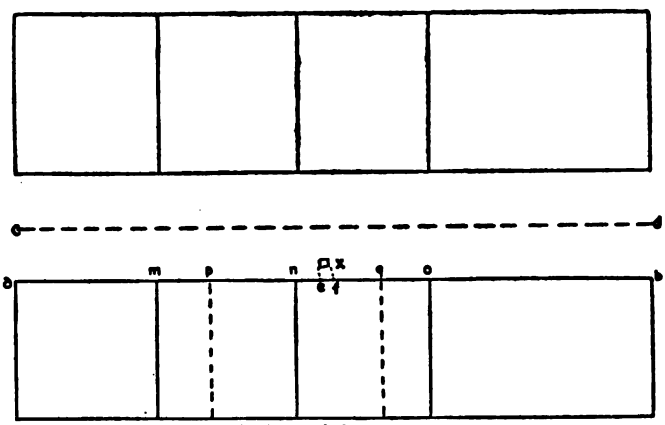

a b is the frontage of block; c d is the center of the street; x is a hole 2 feet square; m n and n o are lot frontages as shown on one map; p q is a lot frontage as shown on another map. Y owns the frontage m q. What property is subject to the lien? It would hardly seem that e f, a two-foot strip, is alone liable; and it would seem clear that the lots as shown on the maps cannot control the liability. It is my contention that the property fronting on m q and owned by Y is liable.

§ 326. **Right to Prescribe Penalties.**—The statute confers authority upon the city council to supplement the procedure by providing penalties for nonpayment. "In addition, and as cumulative to the remedies above given, the city council shall have power, by resolution or ordinance, to prescribe the penalties that shall be incurred by any owner or person liable, or neglecting, or refusing to make repairs when required, as provided in section (13) thirteen of this act, which fines and penalties shall be recovered for the use of the city by prosecution in the name of the people of the state of California, in the court having jurisdiction thereof, and may be applied, if deemed expedient by the said council, in the payment of the expenses of any such repairs not otherwise provided for." It is to be observed that the only penalty authorized is for not performing the work. Imprisonment for debt is not contemplated. Apparently, the intent is to authorize the council to prescribe police regulations to enforce quick repairs of defective streets.

§ 327. **Right to Pay Expense Out of Treasury.**—Instead of resorting to the summary procedure, the council may order the expense paid out of the street contingent fund. Section 25 reads: "The city council may, in its discretion, repair and water streets that shall have been graded, curbed and planked, paved and macadamized, and may build, repair, and clean sewers, and shall provide a street contingent fund at the same time and in the same manner as other funds are provided, out of which to pay the cost and expenses of making said repairs, and watering said streets, and building, repairing, and cleaning said sewers; but whenever any unaccepted street or part of a street requires regrading, recurbing, repiling, repaving, replanking, regraveling, or remacadamizing, or requires new culverts, or new crosswalks, or new sidewalks, or new sewers, the work shall be advertised and let out by contract, and the costs and expenses

thereof shall be assessed upon the property affected or benefited thereby, the same as in the first instance."

The word "repair" as here used does not include an original improvement, or work of a different character from that previously done.[14] Construing this section, the Supreme Court has said: "The provisions of the first part of section 25 do not by their terms apply to accepted streets, but merely authorize the city council to 'repair' streets upon which certain work has been done; and the provisions of the latter part of the section requiring advertising and assessment, when the work to be done upon an unaccepted street is new work of the same character as had been previously done, cannot be construed as importing into the first part of the section a condition that the repairs therein authorized are to be made upon an accepted street. We must assume that if the legislature had intended that the express provision which it made in section 20 for the improvement and repair of accepted streets, and for a fund out of which the expense should be paid, should be superseded by the provisions of section 25, it would have so declared in some direct or unequivocal language."[15]

[14] Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.
[15] Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.

DIVISION 8.

MISCELLANEOUS PROVISIONS.

§ 328. Acceptance of street—In general.
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§ 328. Acceptance of Street—In General.—Prior to 1911, the Vrooman Act provided for the acceptance of an improved street and its maintenance thereafter by the city. In 1911 this provision was repealed. Inasmuch as many streets have been accepted under this provision, it is necessary that it be discussed.

Section 20 provided: "Whenever any street, or portion of of a street, has been, or shall hereafter be fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, and a sewer, gas-pipes, and water-pipes are laid therein, under such regulations as the city council shall adopt, the same shall be accepted by the city council, by ordinance, and thereafter shall be kept in repair and improved by the said

municipality; the expense thereof, together with the assessment for street work done in front of city property, to be paid out of a fund to be provided by said council for that purpose; provided, that the city council shall not accept of any portion of the street less than the entire width of the roadway (including the curbing), and one block in length, or one entire crossing; and, provided further, that the city council may partially or conditionally accept any street or portion of a street, without a sewer, or gas-pipes, or water-pipes therein, if the ordinance of acceptance expressly states that the council deems such sewer, or gas-pipes, or water-pipes, to be then unnecessary, but the lots of land previously, or at any time, assessable for the cost of constructing a sewer, shall remain and be assessable for such cost, and for the cost of repairs and restoration of the street damaged in the said construction, whenever said council shall deem a sewer to be necessary, and shall order it to be constructed, the same as if no partial or conditional acceptance had ever been made. The superintendent of streets shall keep in his office a register of all streets accepted by the city council under this section, which register shall be indexed for easy reference thereto." This provision is the authority for payment by the city of all the expense, and its requirements must be followed.[1] Under a similar statute, it was held that the council may accept the sidewalk as well as the roadway.[2] The acceptance of a street does not relieve the abutting property from liability for assessments for work done upon unaccepted portions of the street.[3] An acceptance of work done on a street does not constitute an acceptance of the street; nor will an acceptance of a part alone be valid.[4]

1 See City Imp. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855.

2 Bonnet v. San Francisco, 65 Cal. 230.

3 San Francisco v. Certain Real Estate, 42 Cal. 513.

4 Oakland Pav. Co. v. Rier, 52 Cal. 270.

§ 329. **Same—Conditions.**—"The authority here given to the city council to accept the street is conditional merely upon the street having been 'fully constructed' as therein specified. Whether the work of such construction was done by the owners of the adjacent land at their own expense, or under a contract with the city; whether such contract was valid or not, or was so performed as to entitle the contractor to an assessment therefor; or whether the owners of the land assessed paid the assessment without objection, or successfully contested its enforcement, are matters immaterial to the validity of such acceptance of the street. If the street has been in fact fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, the duty is placed upon the city council to accept the same, and after such acceptance to keep it in repair at the public expense."[5] Accordingly, it is held that the fact that an assessment for the work is invalid because of an unlawful extension of time is immaterial.[6]

§ 330. **Same—Conclusiveness of Determination.**—An important question arises as to the conclusiveness of a determination by the council that the work has been fully done. It would seem clear that if the ordinance of acceptance shows on its face that all the work has not been done, the acceptance is not binding. The council is authorized to act only when certain things appear. If the record affirmatively shows no jurisdiction, it is an elementary principle that the action can be collaterally impeached. Where, however, the record is silent, or affirmatively recites the jurisdictional facts, I am of the opinion that the action of the council in accepting cannot be collaterally attacked. It is a general principle that "whenever the jurisdiction of a court not of record depends on a fact which the court is required to

[5] Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855.
[6] Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855.

ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack."[7] This rule applies to determinations of a board of supervisors.[8] It has been applied in a case where a petition signed by a majority of owners was necessary to jurisdiction to order grading, the determination that it had been so signed being held conclusive.[9] "Where a legislative body is given power to act whenever it shall find a given fact to exist, it is not necessary, as a condition to the exercise of the power, that such body should previously or contemporaneously make a declaration that the fact exists. The fact that it takes the action raises the presumption that it had upon inquiry ascertained the existence of the fact, unless the statute giving the power explicitly requires an express finding or declaration of the conditions precedent."[10] It seems to me that these principles apply here. While the statute does not expressly state that the conditions shall be determined by the council, such is the necessary inference; and no other body is authorized to determine the facts. Where the council fraudulently, or in disregard of the rules of law, determines facts contrary to the clear evidence thereon, there is undoubtedly a remedy by a direct attack upon the proceedings; but this is a very different matter from an indirect attack.

§ 331. **Procedure for Improving Accepted Streets.**—Section 20 did not confer power upon the council to improve an accepted street. "That section merely fixes the obliga-

7 Spaulding v. North San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249. See Phelan v. City and County of San Francisco, 62 Cal. 44.

8 Spaulding v. North San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; People v. Hagar, 52 Cal. 182.

9 Spaulding v. North San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249. See, also, German Sav. & Loan Assn. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

10 Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

tion upon the city to bear the entire expense of such improvement. The power to order the work is conferred by the first section of the act, and the character of the work which may be ordered is defined in the second section. Section 1 of the act gives to the city council jurisdiction to order any of the work mentioned in section 2 to be done upon the streets of the city, and the jurisdiction or power with which the council is thus invested extends to '*all* streets, lanes, alleys, places or courts' in the city, and is in all cases to be exercised 'under the provisions hereinafter described.' The subsequent provision in section 20 for accepting a street after certain work has been done therein does not take such accepted street from the jurisdiction thus conferred upon the city council or remove the limitations upon the exercise of this jurisdiction. The accepted street still remains subject to the power of the city council to order its improvement, and the provision in section 20 requiring the municipality to improve such street at its own expense is subordinate to the provision in section 2 that the city council shall order such improvement 'whenever the public interest or convenience may require'; but whenever such order is made, the provision of section 1 requires that the work must be done 'under the proceedings' described in the act.''[11] Thus, the work can be done only under contract let in the manner prescribed; and a contract let without competitive bidding is void.[12] Moreover, the provision as to extensions of time applies.[13] It would seem, however, that only such provisions as can reasonably be applied to the proceedings by the city need be followed. The Supreme Court has said: "We do not hold that, before the

[11] Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863. See, also, Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855; City Street Imp. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776.

[12] Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.

[13] Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22. This case, however, is not a strong authority upon this point. It seems to me that this is too strict a construction.

city council can order the improvement of an accepted street, it is requisite to observe all the steps prescribed in section 3 of the act. By their very terms it is seen that they are intended solely for the benefit and protection of the owners of the property which may be assessed for the expense of the work; but if no part of this expense is to be charged against the property, many, if not all, of these steps would be vain and purposeless, and without the scope of the statute. The purpose and scope of these requirements is indicated by the provision that, after they have been observed, 'the city council shall be deemed to have acquired jurisdiction to order any of the work to be done.' The term 'jurisdiction' implies that the person or tribunal which has 'acquired' it is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired; but, in the matter under consideration, if no charge or lien is to be established against the adjacent property, the necessity of thus acquiring jurisdiction therefor does not arise."[14]

§ 332. **Same—Continued.**—It is probably not necessary that the proceedings show on their face that the city is to pay the expense. Upon this point, the Supreme Court, passing upon the right of an abutting owner to enjoin the work, said: "It was held that the board of supervisors had no power to direct the superintendent to enter into a contract for doing such work, unless it was awarded to the lowest responsible bidder after proposals had been invited under the provisions of section 5. It necessarily follows from the principles of this case that, as the city council had power to award to the respondent a contract for doing the work, he could not be enjoined at the instance of the plaintiffs from performing the contract upon the ground that by reason of the acceptance of the street the cost of

[14] Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.

the improvement was to be borne at the public expense. The contract between the defendant and the city was legally entered into, and it is not alleged that the work to be done by him thereunder will injuriously affect the plaintiffs. Whether the cost of that work shall be borne by the city, or be assessed upon the adjacent lands will be determined after the work under the contract has been completed."[15] This is a mere dictum; but it certainly states a fair rule. In order to recover from the city in a case where an assessment against the property fronting on the work has been made, the plaintiff must allege and show, either that no assessment has been made, as provided in the contract, or that after the issuance of such assessment the property owners had resisted it, and had not paid the amounts assessed.[16]

§ 333. **Right of City to Pay Expense of Other Work Out of Treasury.**—Section 26 provides: "The city council may, in its discretion, order, by resolution, that the whole or any part of the cost and expenses of any of the work mentioned in this act be paid out of the treasury of the municipality from such fund as the council may designate. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, in making up the assessment heretofore provided for such cost and expenses, shall first deduct from the whole cost and expenses such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expenses proportionately upon the lots, parts of lots, and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided." This section clearly authorizes the payment of the whole or a part of the cost out

[15] Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855.

[16] Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22.

of the municipal treasury.[17] Under the terms of the Municipal Improvement Act of 1901, cities are authorized to issue bonds for such purposes.[18] The section does not specify the time when the resolution ordering payment out of the public treasury must be passed. It should be passed, however, before the contract is entered into. Upon this point the Supreme Court has said: "The resolution was passed after the contract was fully performed, and it is clear that before its adoption the city was in no wise liable to pay for any part of the work, the contract expressly providing that it would not be called upon to pay for such work except as provided in the statute under which the contract was made. . . . . This being so, the question is directly presented, whether this naked declaration or resolution of the board of trustees had the effect to create a binding obligation where none existed before. We are of the opinion that it did not. The resolution is without any consideration to support it, and if it had been executed, the payment of the money named in it would have been in the nature of a gift, a purely voluntary payment by the city. It cannot be said even that the defendant was under any moral obligation to pay for this work."[19]

§ 334. **Liability for Defective Streets—In General.**—Sections 22 and 23 set forth the liability of the city, the superintendent of streets, and the owner to third persons for allowing the street to be out of repair. Section 22 reads: "It shall be the duty of the superintendent of streets to see that the laws, ordinances, orders, and regulations relating to the public streets and highways be fully carried into

17 Warren v. Postel, 99 Cal. 294, 33 Pac. 930. See, also, Kreling v. Muller, 86 Cal. 465, 25 Pac. 10.

18 Town of Mill Valley v. House, 142 Cal. 698, 76 Pac. 658; City of San Diego v. Potter, 153 Cal. 288, 95 Pac. 146. Compare City of Redondo Beach v. Cate, 136 Cal. 146, 68 Pac. 586, interpreting the Municipal Indebtedness Act of 1889.

19 McBean v. City of San Bernardino, 96 Cal. 183, 31 Pac. 49.

execution, and that the penalties thereof are rigidly enforced. He shall keep himself informed of the condition of all the public streets and highways, and also of all public buildings, parks, lots, and grounds of said city, as may be prescribed by the city council. He shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties and for such sums as may be required by the city council; and should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect."

Section 23 reads as follows: "If, in consequence of any graded street or public highway improved under the provisions of this act, being out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using said street or public highway, and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city." [19a]

[19a] See the following notes in the American State Reports as to the duty to keep streets and alleys in repair: Boulevards, duties of respecting, 103 Am. St. Rep. 270, 271; electricity, duty of to exercise super-

§ 335. Same—Liability of Street Superintendent Depends upon Notice.—The liability of the superintendent of streets for defects depends upon whether he has notice thereof. If he has actual knowledge of an obstruction

vision over appliances in streets, 100 Am. St. Rep. 535, 536; electricity, liability for injuries due to, 100 Am. St. Rep. 536; liability for injuries to bicyclists, 103 Am. St. Rep. 268, 269; liability, whether may exceed because of their special privileges, 103 Am. St. Rep. 259; obstructions and excavations in, care required with respect to, 103 Am. St. Rep. 273, 287; streets, absence of guard-rails, barriers, etc., liability for, 103 Am. St. Rep. 286; streets, all portions of, whether must be cared for, 103 Am. St. Rep. 271, 272; streets, are not insurers against accidents on, 103 Am. St. Rep. 264; streets, bicyclists, care required of while using, 103 Am. St. Rep. 275; streets, bicyclists, rights of in, 103 Am. St. Rep. 268; streets, blind horses, care which drivers of must exercise in using, 103 Am. St. Rep. 276; streets, blind persons, care which must exercise in using, 103 Am. St. Rep. 276; streets, building materials in, liability for, 103 Am. St. Rep. 289; streets, care and maintenance of, whether a municipal duty, 103 Am. St. Rep. 261; streets, care of as dependent on the frequency of the use of the street, 103 Am. St. Rep. 26; streets, care of, whether dependent on the topography of the street, 103 Am. St. Rep. 266; streets, care required of pedestrians in, 103 Am. St. Rep. 274; streets, care required of when street is used as a boulevard, 103 Am. St. Rep. 270; streets, care to be exercised along the sides of, 103 Am. St. Rep. 271; streets, care which must be exercised respecting, 103 Am. St. Rep. 263, 265; streets, car tracks of street railways in, liability for dangerous, 103 Am. St. Rep. 290, 291; streets, dangerous appliances or machines in, liability for injuries due to, 103 Am. St. Rep. 293; streets, defects in, when deemed the proximate cause of an injury, 103 Am. St. Rep. 279; streets, duty of in respect to, whether and how modified by topography, 103 Am. St. Rep. 265; streets, duty of to guard excavations in, 103 Am. St. Rep. 273, 274; streets, duty of to keep in repair is not limited to the traveled portion, 103 Am. St. Rep. 293; streets, duty of to replace warning signals improperly removed, 103 Am. St. Rep. 274; streets, duty to furnish reasonably safe, 103 Am. St. Rep. 258; streets, duty to repair defects in, 103 Am. St. Rep. 263; streets, electric wires in, liability for, 103 Am. St. Rep. 289, 290; streets, latent defects in culverts and catch-basins, liability for, 103 Am. St. Rep. 285; streets, liability for defects in, denial of because they were not the proximate cause of an injury, 103 Am. St. Rep. 279, 280; streets, liability for condition of is not impaired by contracts with private persons, 103 Am. St. Rep. 263; streets, liability for neglecting to perform duties respecting grounds for, 103 Am. St. Rep. 259, 260; streets, liability for not keeping in repair, lack of funds does not destroy, 103 Am. St. Rep. 264; streets, liability for unguarded, 103 Am. St. Rep.

in the street, it is his duty to act, without a formal notice.[20] Where he has not personal knowledge, however, it is necessary to give some notice, although it need not in all cases be served upon the superintendent of streets personally. Thus, in one case it appeared that notice of an obstruction and lack of lights was given by a police officer and other persons to a deputy at the office of the superintendent of streets. The court said: "But here everything that could be done to notify the superintendent was done. He was sought at his place of business during business hours, and, in his absence, his deputy and representative was notified.

263; streets, lighting of, liability for omitting, 103 Am. St. Rep. 272; streets, mud and water in, liability for injuries due to, 103 Am. St. Rep. 293; streets, negligence, contributory in using defective, 103 Am. St. Rep. 279, 280; streets, negligence in maintaining, cases denying liability for, 103 Am. St. Rep. 262; streets, negligence in maintaining, liability for, 103 Am. St. Rep. 260; streets, negligence in using defective, 103 Am. St. Rep. 278; streets, negligence of driver in, when not imputable to his guests, 103 Am. St. Rep. 275; streets, negligence, whether imputable to person using defective, 103 Am. St. Rep. 277; streets, notice of defects in given to officers of, 103 Am. St. Rep. 282; streets, notice of defects in, imputing from lapse of time, 103 Am. St. Rep. 282, 283; streets, notice of defects in, what constitutes, 103 Am. St. Rep. 281; streets, notice of defects in when essential to liability, 103 Am. St. Rep. 280, 281; streets, notice of defects in, when implied, 103 Am. St. Rep. 273; streets, obstructions in, what may be tolerated, 103 Am. St. Rep. 283, 284, 288, 289; streets, obstructions outside of or near, liability for injuries due to, 103 Am. St. Rep. 294; streets, pedestrians, liability of to for defects in, 103 Am. St. Rep. 269, 270; streets, pedestrians, right to cross any place, 103 Am. St. Rep. 277; streets, plans of, when liable for defects in, 103 Am. St. Rep. 266; streets, poles, stakes, hydrants and other obstructions in, 103 Am. St. Rep. 288; streets, railings and other safeguards, liability for not keeping in repair, 103 Am. St. Rep. 272; streets, rights of the public to assume the safety of, 103 Am. St. Rep. 277; streets, ruts, depressions or excavations in, liability for, 103 Am. St. Rep. 287; streets, snow and ice in, liability for injuries due to, 103 Am. St. Rep. 291, 292; streets, storage of vehicles in, liability for injuries due to, 103 Am. St. Rep. 267; streets, uses for which must be kept reasonably safe, 103 Am. St. Rep. 294; streets, vehicles for which must be made sufficient, 103 Am. St. Rep. 267.

20 Merritt v. McFarland, 4 Cal. App. 390, 88 Pac. 369. In general, see 103 Am. St. Rep. 280, note; 95 Am. St. Rep. 84, note.

If such notification, to meet the circumstances of cases such as this, be held insufficient, it would be necessary merely for the superintendent of streets to immure himself in his private office during business hours, and forever escape the liability with which the law seeks to charge him for the careless or negligent performance of his duties. Such is an unreasonable construction of the law, and we hold that this notice, timely made, at the place of business of the public official, and in his absence to his deputy there representing him, is a notice sufficient under the provisions of the street laws."[21] It is probably not necessary that the superintendent have notice of the precise defect which occasioned the injury. Notice of the general unsafe condition of the street is sufficient.[22]

§ 336. **Same—Extent of Liability.**—The liability of the superintendent of streets is not confined to cases where the street is merely out of repair, but extends as well to cases where a street is obstructed without proper barriers. In other words, where the superintendent knows that the contractor has torn up a street, it is his duty to see that proper barriers and lights are placed to protect users of the street. Thus, in one case, a street contractor placed a pile of bitumen in the street and neglected to maintain a proper light. As a result, plaintiff's automobile struck the pile and was damaged. It appeared that the superintendent of streets had notice of the obstruction for more than twenty-four hours. The court held the superintendent liable.[23] And in another case a street superintendent was held liable for failure to place lights or barriers at an embankment in a street made under his direction.[24] Moreover, the street

21 Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881.

22 Heath v. Manson, 147 Cal. 694, 82 Pac. 331 (a case decided under the San Francisco charter).

23 Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881.

24 Merritt v. McFarland, 4 Cal. App. 390, 88 Pac. 369.

superintendent may become liable to the owner when he improperly accepts work.[25]

§ 337. **Same—Liability is Personal.**—The duty imposed by these sections is a personal duty imposed by law, and the individual person or persons who neglect to perform it are made personally liable for injuries resulting from such neglect.[1] The owner thus may become personally liable for a failure to perform the duty.[2] We have already seen that, in general, a street assessment cannot be made a personal liability upon the owner.[3] Hence, it would seem that the only ground upon which such a liability can be imposed on the owner is that it is a proper exercise of the police power. It is held that "the estate represented by a person upon whom this duty is cast is no more liable for his neglect of a personal duty than it would be for a fine which might be imposed upon him by a criminal court for an assault and battery committed by him while in possession of such estate."[4] It follows that the land is not liable primarily, and that it can be reached only as a part of the general assets of the owner.

§ 338. **Same—Action is Based on Negligence.**—The action is based on negligence. By the express terms of section 23, only persons who exercise ordinary care are entitled to recover. Persons whose negligence contributes to the injury are not entitled to judgment. All who are negligent are made jointly and severally liable, and may be made defendants in one action.[5] It is not necessary, however, to join all. "The rule is fundamental that if several

[25] Goodsell v. Ashworth, 115 Cal. 222, 46 Pac. 1066; Goodsell v. Ashworth, 96 Cal. 397, 31 Pac. 261.

[1] Eustace v. Jahns, 38 Cal. 3.

[2] See Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760.

[3] See ante, sec. 18.

[4] Eustace v. Jahns, 38 Cal. 3.

[5] See Doeg v. Cook, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707.

are guilty in common of tort the injured person has his right of action for damages against all or each, and may sue them either individually or collectively."[6]

§ 339. **Same—When City not Liable.**—In cities governed by these provisions, the city itself is not liable for damages caused by defective streets. And in the absence of charter liability, the members of the council or legislative body are not liable. "They are only the agents of the city and, as such, they appoint the superintendent of streets. They do not, however, stand in the relation of principal to the superintendent, and are not responsible for the faithful performance of the duties of his office."[7] They may be made liable, however, by charter provisions.[8] In the absence of special provision, the city is not liable for the negligence of the contractor in the manner of doing the work.[9]

§ 340. **Liability of Contractor.**—A contractor is liable only for such damages as are caused by his negligence in doing the work. He is not liable for damages caused by doing the work in a proper manner. Negligence or want of skill will not be presumed, but must be proved.[10] Accordingly, it is held that a contractor is not liable for damages caused by raising the grade of the street, unless he departs from the official grade.[11]

§ 341. **Inspection.**—Section 35, as amended in 1911, provides: "The superintendent of streets shall, when in his

6 Heath v. Manson, 147 Cal. 694, 82 Pac. 331.

7 Merritt v. McFarland, 4 Cal. App. 390, 88 Pac. 369.

8 Heath v. Manson, 147 Cal. 694, 82 Pac. 331. See, also, Doeg v. Cook, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707.

9 Krause v. City of Sacramento, 48 Cal. 221; O'Hale v. City of Sacramento, 48 Cal. 212. See, also, James v. City of San Francisco, 6 Cal. 528, 65 Am. Dec. 526.

10 Shaw v. Crocker, 42 Cal. 435. As to his liability for negligence, see Gay v. Engebretsen, 158 Cal. 21, 109 Pac. 876.

11 Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829; Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879.

judgment it is necessary, appoint a suitable person to take charge of and superintend the construction and improvement of each and every sewer constructed or improved under the provisions of this act, and of piling and capping sidewalks, or of the paving of whatever character heretofore mentioned, in whole or in part, of one block or more, whose duty it shall be to see that the contract made for the doing of said work is strictly fulfilled in every respect, and in case of any departure therefrom to report the same to the superintendent of streets. Such person shall be allowed for his time actually employed in the discharge of his duties such compensation as shall be just, but not to exceed five dollars per day. The sum to which the party so employed shall be entitled shall be deemed to be incidental expenses, within the meaning of those words as defined by this act."

§ 342. Procedure for Compelling Work by Railroads.— We have already seen that the cost of work required to be done by railroads cannot be assessed upon abutting property. Section 498 of the Civil Code requires street railway companies "to plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings." Prior to 1911 the only procedure for enforcing this duty was contained in section 6 of the Bond Act. In 1911, the legislature amended section 7 of the Vrooman Act by inserting in subdivision 12 a procedure for enforcing this liability. It is to be noted that this does not contemplate a special assessment upon any theory of benefits. It enforces a positive duty imposed by law as a condition to the right to use the streets.[12]

[12] In general, as to the duty of street railroads to pave and repair streets, see 104 Am. St. Rep. 648, note; 25 Am. St. Rep. 481, note.

§ 343. Same—Effect of Resolution of Intention.—Subdivision 12 of section 7 reads in part as follows: "Whenever any railroad track or tracks of any description exist upon the street or streets upon which the city council of any city has ordered an improvement to be made, and has excepted therefrom the portions used by the track, between the rails and for two feet on each side thereof, and between the tracks if there be more than one, the said order, unless said city council shall by resolution theretofore passed have declared the contrary, shall be deemed to be and constitute a requirement that the person or company having said railroad track or tracks thereon shall improve the said portion with improvements similar in all respects to, with the same materials, under the same specifications and superintendence, and to the like satisfaction as those ordered to be performed by said order ordering the work, and the resolution of intention and notice of proposed improvement shall be construed and are hereby declared to be notice to said person or company of the intention to order the same." This is quite different from the corresponding provision of the Bond Act. It is to be noted that no personal service upon the company is required.

§ 344. Election to Do the Work.—The company is then given the right to do the work itself. To do so, however, it must file an election. The section provides: "Thereupon it shall be the duty of said person or company having such track or tracks on such street or streets to notify in writing the superintendent of streets if such person or company elects to perform such work at its own charge and expense and under its own direction; said notice must be delivered to the superintendent of streets within ten days after the first publication of notice or award of contract. The omission or neglect to make such election shall be construed as constituting the superintendent of streets the agent of the owner of said track or tracks, with authority to enter into

a contract made in accordance with the provisions of this section for making the said improvements."

§ 345. **Public Contract.**—In case no election is filed, the city is authorized to proceed. The section provides: "Said superintendent of streets shall advertise for bids for the improvement of said portions of street or streets lying between the rails and for two feet on each side thereof, and between the tracks, if there be more than one. It shall be the duty of said city council to award the contract for the making of said improvements to the lowest regular responsible bidder. Such bidding and awarding of contracts shall be made in the same manner hereinbefore provided for the awarding of contracts for improvements, excepting that no notice of award shall be published. Immediately upon the award, the superintendent of streets shall enter into a contract with the person to whom said contract was awarded for the making of said improvement or improvements upon the portions of the street or streets described in said notice inviting bids, and at the price stated in said bid. The contractor shall execute bonds in the manner required for the execution of contracts for improvements."

§ 346. **Same—Enforcement of Contract.**—The contract is enforced by suit. The section provides: "Upon the completion of the work and its acceptance, the street superintendent shall make a certificate of such completion together with a statement of the amount due under the terms of said contract for the performance of said work. Such certificate shall be countersigned by the mayor of said city, and shall be recorded in the office of said superintendent of streets. The contractor shall thereupon be entitled to payment of the full amount of said contract price, and the recording of such certificate shall be sufficient notice to the owner of such track or tracks that said contract price is due and payable. In the event that such amount is not

paid within thirty days from the date of the recording of said certificate, the contractor may file a sworn statement to that effect with the superintendent of streets, who shall record the same in his office in the book in which the certificate of acceptance has been recorded. Said contractor shall thereupon have a cause of action against said person or company owning said track or tracks for the amount of said contract, together with a reasonable attorney's fee, and shall also have as security for the recovery of such amount, a first lien upon the track and franchises of said person or company, between whose rails or tracks the said work has been performed, contained within the corporate limits of the said city. In such suit, the certificate of the superintendent of streets, hereinbefore mentioned, shall be and constitute prima facie evidence of the regularity of all proceedings, and of the right of the contractor to recover judgment against said person or company. Execution may be taken out upon the entry of judgment, and levied upon any property of said person or company subject to execution."

§ 347. Same—Remedy Where Company Fails to Prosecute the Work.—The section provides: "In the event that said person or company shall file the written election to perform such work at its own cost and expense and its own direction, no further proceedings shall be taken in the matter unless such person or company neglects or fails for thirty days, or for such further time as the city council may grant, to make said improvement. In the event that the improvement of the portions of the street or streets above described between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, shall not be made with diligence, or in all respects similar to the improvement of the rest of the street, or with the same materials or under the same specifications, and to the satisfaction of the superintendent of streets, the city council of said city may, by resolution entered in its

minutes, prescribe such terms and conditions as to it may seem fit and proper before permitting the said person or company to continue with the said improvement. If the said person or company shall, after three days' notice of the adoption of said resolution, fail to comply with the terms and conditions so prescribed, the said city council may declare said person or company to have forfeited its privilege of performing such work under its own direction. Whereupon the street superintendent shall advertise for bids for the performance of such work, or such portions thereof as may remain uncompleted, and the contract therefor shall be awarded and entered into in the same manner hereinbefore provided for the awarding and execution of contracts where said person or company has not elected to make the improvement under its own direction; and upon the completion of the improvement the contractor to whom such contract may be awarded, or his assigns, shall be entitled to a certificate from the street superintendent similar to that herebefore provided for, and shall have the right to collect from said person or company by suit the amount specified in such certificate in all respects the same as is hereinbefore provided where the contract is let for such improvement in the first instance."

§ 348. **Right of City to Do Street Work Without Contract.**—Section 56 of the Vrooman Act provides as follows: "When the work prescribed by the resolution of intention is exclusively sidewalk or curbing work with or without such grading as is incidentally necessary to the doing of such sidewalk or curbing work, and no proposals or bids for doing the work are delivered to the clerk, as invited by the notice inviting the same, as provided for in section 5 of this act, the city council may, in its discretion, by a vote of three-fourths of its members in the affirmative, direct that a proposal or bid in the name and on the part of the city be filed, whereupon the contract for doing the

work shall be awarded to the city, and the city shall thus be and become the 'contractor' within the meaning of this act. And when the time has expired within which, as provided in said section 5 of this act the owners may elect to take the contract, shall have expired, and such owners have not so elected, the city shall be deemed to have undertaken to do and complete the work, at the price named, in such bid or proposal, within ninety days after the time when as aforesaid it is to be deemed to have undertaken the same, and to begin such work within fifteen days after said time. The city need not enter into a contract with the superintendent of streets, as provided in section 6 of this act, nor give any check or bond either upon bidding or to secure the performance of the work or payment for labor or materials. The warrant provided for in section 9 of this act shall be delivered to the clerk of the city council, and such clerk is hereby authorized to make on the part of the city the demand provided for in section 10 of this act. Except as in this section expressly provided otherwise, all and singular the provisions of this act shall apply in the case where the city, under the provisions of this section, becomes the contractor, that is to say, undertakes to do the work. And all the rights, dues and remedies of the 'contractor,' under the provisions of this act, shall accrue to the city in its character of one undertaking to do the work, as provided in this section." This provision is said to be unconstitutional.[13]

[13] City of Los Angeles v. Lelande, 11 Cal. App. 302, 104 Pac. 717.

DIVISION 9.

PROCEDURE FOR SEWER WORK.

§ 349. In general.
§ 350. General jurisdiction.
§ 351. Not necessary to provide for outlet.
§ 352. Right to assess cost.
§ 353. Issuance of bonds—Preliminary procedure.
§ 354. Same—Election.
§ 355. Same—Ordinance providing for.
§ 356. Same—Form of bonds.
§ 357. Same—Sale.
§ 358. Same—Fund into which proceeds must be paid.
§ 359. Same—Sinking fund.
§ 360. Procedure for contracts and work.

§ 349. In General.—The Vrooman Act provides a complete scheme for the construction of sewers. In general, the procedure is the same as that provided for ordinary improvements; so we shall discuss here only such matters as are peculiar to sewer construction. The sections of the act involved are section 24 and sections 27 to 33, inclusive. These provide four methods for the payment of the cost of such work: (1) by a front-foot assessment; (2) by an assessment upon the district plan; (3) by payment out of a street contingent fund; (4) by a bond issue. In addition, under the terms of section 26, the cost may be paid out of the city treasury, from such fund as the council may designate. The provisions of the Vrooman Act as to sewers are not exclusive.[1] The work may be paid for by means of a bond issue authorized by the Municipal Improvement Act of 1901.[2] There is no real difference in the principles relating to assessments applicable to general street work and to sewers, "except in the wider latitude of discretion given to the city

[1] Peckham v. City of Watsonville, 138 Cal. 242, 71 Pac. 169.

[2] Town of Mill Valley v. House, 142 Cal. 698, 76 Pac. 658. See, also, City of Redondo Beach v. Cate, 136 Cal. 146, 68 Pac. 586; Rice v. Board of Trustees of Town of Haywood, 107 Cal. 398, 40 Pac. 551.

council in determining what property will be benefited, and the mode of apportioning the cost."[3]

§ 350. **General Jurisdiction.**—Section 24 adds little, if anything, to the preceding sections. It reads: "The city council of such city shall have full power and authority to construct sewers, gutters, and manholes, and provide for the cleaning of the same, and culverts or cesspools, or crosswalks, or sidewalks, or any portion of any sidewalk, upon or in any street, avenue, lane, alley, court, or place in such city; and also for drainage purposes, over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same, of such materials, in such a manner, and upon such terms as it may be deemed proper. None of the work or improvements described in this section shall be stayed or prevented by any written or any other remonstrance or objection, unless such council deems proper." The method by which this section was amended has been criticised; but it is held that it was legally adopted.[4]

This, read in connection with sections 3 and 7, establishes the right of the council to order the work on the front-foot plan.[5] The statement that the work shall not be stopped by protests is merely a repetition of the statement in section 3.

§ 351. **Not Necessary to Provide for Outlet.**—It is not necessary that an outlet for a sewer be provided before the work is ordered or done. Upon this point the Supreme Court has said: "It is contended that since the structure has no outlet, and since, as counsel claim, it is legally impossible —or was so impossible at the time the work was done—to procure an outfall, it is not a drain, and cannot be made one,

[3] Williams v. Rowell, 145 Cal. 259, 78 Pac. 725.
[4] Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658.
[5] White v. Harris, 103 Cal. 528, 37 Pac. 502.

and therefore is not a sewer, and the board had not the power to contract for its construction. It may be very unwise, and even reckless, on the part of the board to order work done under such circumstances, but, conceding it to be so, I cannot see how that would affect their power. It is their duty to provide the means of disposing of the sewage. If there can be no outlet provided into the ocean, or some other permissible place, the board must dispose of it in some other mode, and may gather it for that purpose. It is their province to determine whether sewers are needed, and what districts will be benefited thereby. Upon these points their judgment is ordinarily final. And there may have been, in the judgment of the board, other reasons why this sewer should be thus constructed, although it would not be at once utilized. Besides, the property owners should have protested against the work on that ground, if their complaints are well founded. As we have seen, the work was within the general power of the board, though to construct this sewer may have been an improvident use of the power. Possibly if, as a matter of law, we could see that the structure could not be useful, the conclusion of the board would not prevent the courts from giving relief. But the aggrieved owner should exhaust the special remedies provided before he applies to the court. The board could have afforded him all the relief he required. If he had protested in time, the contractor might not have expended his money and labor in the improvement of the property. Since the law provided that he should object, and he did not, he should not now be heard, unless there was a total absence of power in the board to do the work, or the procedure has been materially departed from. A property owner should not thus sit by and see his property improved and expect to escape the expense."[6]

[6] Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

§ 352. **Right to Assess Cost.**—Section 27 provides: "Whenever the city council deem it necessary to construct a sewer, then the said council may, in its discretion, determine to construct said sewer, and assess the cost and expenses thereof upon the property to be affected or benefited thereby, in such manner and within such assessment district as it shall prescribe, and the lien therefor upon said property shall be the same as is provided in section 9 of this act, or said council may determine to construct said sewer and pay therefor out of the street contingent fund." This section provides for two distinct methods for paying for the work, viz., by a district assessment and by direct payment from the street contingent fund. It is questionable whether this adds anything to the general rules. Section 3 authorizes an assessment upon the district plan, and section 26 authorizes payment by the city. It is not necessary, in a proceeding under section 27, that the resolution of intention recite that it is necessary to construct the sewer.[7] Where the work is to be done upon the district plan, the resolution of intention should show that the costs and expenses are to be assessed upon a district benefited, and should describe the district.

§ 353. **Issuance of Bonds—Preliminary Procedure.**—Sections 28 to 32, inclusive, provide for the issuance of municipal bonds for the purpose of paying the cost of constructing sewers. These provisions are not exclusive; for, as we have seen, the Municipal Improvement Act of 1901 provides for bonds for such purposes under a different procedure.[8] The first step in the procedure under the Vrooman Act is the passage of a resolution calling an election and directing notice thereof to be given. The contents of this resolution should be as follows: (1) It should contain a statement that the city council deems "it necessary to incur a bonded in-

7 Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

8 See ante, sec. 349.

debtedness for the construction of sewers, in excess of the money in the street contingent fund applicable to the construction of sewers." While this may not be an absolute essential, it is well to insert it. (2) It must call an election to determine whether the indebtedness shall be incurred. This necessarily implies that it shall fix the date therefor. The statute is silent as to the manner of voting. Hence it would seem that this must be governed either by the provisions of the city charter, if the charter contains valid provisions for such an election, or by the general law. It is customary in bond proceedings to recite in the call the manner and place of voting, the form of ballot, and the names of the officials appointed to conduct the election. (3) It must "specify the amount of indebtedness proposed to be incurred, the route and general character of the sewer, or sewers to be constructed, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund." Section 28 makes these requirements for the notice of election. Inasmuch as the notice must, of necessity, be confined to matters decided by the council, it follows that these matters must be contained in the resolution. The statements must be full enough to give the voter "sufficient data upon which to calculate with certainty the amount of tax levy which would be required each year to pay the indebtedness which he proposed by his vote to incur."[9] The statute provides that "no other question or matter shall be submitted to the electors at such election." The reference to "the sewer or sewers to be constructed" shows the intent to authorize the construction of several in one proceeding; and all may be submitted together as one proposition, so that all will carry or all fail.[10] It is

[9] City of San Luis Obispo v. Haskin, 91 Cal. 549, 27 Pac. 929; Derby v. City of Modesto, 104 Cal. 515, 38 Pac. 900.

[10] See People v. Counts, 89 Cal. 15, 26 Pac. 612 (a good discussion of the general proposition arising out of bond issue authorized by the County Government Act); City of Oakland v. Thompson, 151 Cal. 572, 91 Pac. 387 (a bond issue under the Municipal Improvement Act).

possible to construe the words "question or matter" as referring to all sewer matters, and merely confining the election to questions of sewers. This construction would permit several sewer propositions to be submitted separately. (4) It must fix the time the bonds are to run, which term is limited to twenty years. This is necessary in order that the resolution may state the amount to be raised annually. (5) It must state definitely the amount of interest the bonds are to bear. This is also necessary in order to state the amount to be raised. Section 29 provides that "said bonds shall bear interest, to be fixed by the city council, at the rate of not to exceed five per cent per annum." (6) It must direct publication of notice embodying the matters above mentioned. It is customary in bond proceedings to set out the notice in full in the call for the election. The newspaper in which the publication is to be made must be designated. It is also well to state the length of time the publication is to be made, although a publication for the statutory time would probably be sufficient. The statute provides that it shall be published for at least three weeks.

§ 354. **Same—Election.**—Notice of the election, published as prescribed, is essential to the validity of the election. The election must be held in the manner prescribed by law, and must conform to the call. If the ballots vary materially from those prescribed in the call, the election is not valid, and a valid bond issue cannot be made.[11] If the proposition is carried by an affirmative vote of two-thirds of the qualified electors voting at such election, the council has jurisdiction to proceed.

§ 355. **Same—Ordinance Providing for.**—Upon the proposition being carried by the electors, "it shall be the duty

11 See Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699.

of the city council to pass an ordinance providing for the mode of creating such indebtedness, and of paying the same; and in such ordinance provision shall be made for the levy and collection of an annual tax upon all the real and personal property subject to taxation, within such city, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within a period of not more than twenty years from the time of contracting the same." This ordinance must be consistent in all material respects with the resolution calling the election and submitting the matter to the electors; for the council has jurisdiction only to the extent that the electors have authorized it. It is not necessary to follow the call as to matters of surplusage contained therein.[12] Thus, in a proceeding under another statute where it was not necessary for the call to specify the denomination of the bonds, it was held that the council might provide for other denominations in the ordinance.[13] The ordinance should specify the denominations of the bonds and the form. It is customary in bond proceedings to set forth the form of the bond in the ordinance.

§ 356. **Same—Form of Bonds.**—The precise form of the bonds is not prescribed. Section 29 provides, however: "If bonds are issued under the provisions of the last section, said bonds shall be in sums of not less than one hundred dollars nor more than one thousand dollars, shall be signed by the mayor and treasurer of the city, and the seal of the city shall be affixed thereto. Coupons for the interest shall be attached to each bond, signed by the mayor and treasurer." It is not necessary that the bonds be signed by hand. A printed, stamped, or lithographed signature may be

[12] City of Santa Barbara v. Davis, 6 Cal. App. 342, 92 Pac. 308.

[13] City of Santa Barbara v. Davis, 6 Cal. App. 342, 92 Pac. 308; Law v. City and County of San Francisco, 144 Cal. 384, 77 Pac. 1014; Derby v. City of Modesto, 104 Cal. 515, 38 Pac. 900.

adopted.[14] Frequently the bonds themselves are signed by hand, while the signatures to the coupons are lithographed.

§ 357. **Same—Sale.**—The sale of the bonds is governed by sections 30 and 31. Section 30 provides: "Before the sale of said bonds, the council shall, at a regular meeting, by resolution, declare its intention to sell a specified amount of said bonds, and the day and hour of such sale, and shall cause such resolution to be entered in the minutes, and shall cause notice of such sale to be published for fifteen days in at least one newspaper published in the city in which the bonds are issued, and one published in the city and county of San Francisco, and in any other newspaper in the state, at their discretion. The notice shall state that sealed proposals will be received by the council for the purchase of the bonds on the day and hour named in the resolution. The council, at the time appointed, shall open the proposals and award the purchase of the bonds to the highest bidder, but may reject all bids."

By the terms of section 31 "the council may sell said bonds, at not less than par value, without the notice provided for in the preceding section." The provisions as to sale must be followed, for otherwise there is not a valid delivery.

§ 358. **Same—Fund into Which Proceeds must be Paid.**—Section 32 provides for the creation of a fund in the city treasury into which the proceeds of the bonds issued shall be paid; and also for the payment of the cost of construction out of such fund. "The proceeds of the sale of the bonds shall be deposited in the city treasury, to the account of the sewer fund, but no payment therefrom shall be made, except to pay for the construction of the sewer or sewers, for the

[14] See Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 99; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849; In re Deer River Nat. Bank, 73 Conn. 341, 47 Atl. 675.

construction of which the bonds were issued, and upon the certificate of the superintendent of streets and the city engineer that the work has been done according to the contract; provided, that after the completion of the sewers, for the construction of which said bonds were issued, if there be any money of said fund left in the treasury, the same may be transferred to the general fund, for general purposes."

§ 359. **Same—Sinking Fund.**—Section 28 requires the council, in its ordinance, to provide for a sinking fund to pay the principal as it falls due, as well as a fund for the interest. It is then made "the duty of the city council in each year thereafter, at the time when other taxes are levied, to levy a tax sufficient for such purpose, in addition to the taxes authorized to be levied for city purposes. Such tax, when collected, shall be kept in the treasury in a separate fund, to be inviolably appropriated to the payment of the principal and interest of such indebtedness."

§ 360. **Procedure for Contracts and Work.**—Section 33 provides the procedure for ordering the work and letting the contract. It reads: "Whenever said council shall determine to construct any sewer, and pay therefor out of the street contingent fund, or by the issuance of bonds, as above provided, then said council shall cause to be prepared plans and specifications of said work in sections, and shall advertise for twenty days in at least one newspaper published in the city in which the sewer is to be constructed, and one in the city and county of San Francisco, for sealed proposals for constructing said sewer. The work may be let in sections, and must be awarded to the lowest responsible bidder, the council having the right to reject any and all bids. The work shall be done and the materials furnished under the supervision and to the satisfaction of the superintendent of streets and the city engineer." In my opinion,

it is the purpose of this section to govern all proceedings to which it refers, and that the earlier general provisions do not apply. Section 32 supplements it by requiring a certificate of the superintendent of streets and city engineer before the work is paid for.

DIVISION 10.

PROCEDURE FOR CHANGE OF GRADE.

§ 361. In general.
§ 362. Effect of failure to provide compensation upon assessment.
§ 363. This portion applies only to change, not to original establishment, of grades.
§ 364. Petition of property owners.
§ 365. Resolution of intention.
§ 366. Description of the grade.
§ 367. Notice of intention.
§ 368. Same—Who entitled.
§ 369. Petition claiming damage.
§ 370. Duties of commissioners.
§ 371. Report of commissioners.
§ 372. Notice of filing of report.
§ 373. Objections, and notice of hearing.
§ 374. Hearing and determination.
§ 375. When change takes effect.
§ 376. Procedure for award of contract.
§ 377. The contract.
§ 378. Assessment for the work.
§ 379. Lien of the assessment.
§ 380. Collection of the assessment—In general.
§ 381. Same—Sale.
§ 382. Same—Same—Application of provisions relating to general taxation.
§ 383. Payment of damages.
§ 384. Acceptance—Appeal.
§ 385. Eminent domain proceedings.

§ 361. **In General.**—In 1891, the legislature amended the Vrooman Act by adding sections 38 to 53, inclusive, which provided an elaborate procedure for changing the official

grade of streets.[1] At the same session, other sections, numbered 38 to 44, inclusive, relating to the issuance of bonds, were also adopted;[2] but these were repealed and re-enacted into a separate act in 1893.[3] The amendments of 1891 are quite similar to the provisions of a prior act.[4] In 1893, sections 38 to 53 were amended to read in their present form.[5] They now authorize not only the change of the paper grade, but the actual doing of the work. The necessity for these provisions arises from the constitutional provision that property shall not be damaged for public use without compensation. A change of grade frequently causes damage.[6] Hence it becomes necessary to provide a procedure for assessing and paying the damage. In 1909 the legislature passed another act providing for the change of grades and prescribing an alternate procedure. This later act, however, does not affect the Vrooman Act.[7]

362. Effect of Failure to Provide Compensation upon Assessment.—It has been said that assessment liens are not void because of failure first to provide compensation to the lot owner; that the power of taxation, unlike that of eminent domain, may be exercised although damages have not been paid to the owner before the street work is done.[8] It may be admitted that actual payment of damages is not necessary before an assessment can be collected. A more important question is whether an assessment is valid when no provision has been made for payment of damages. Where the work consists in grading to a grade originally estab-

1 Stats. 1891, p. 461.
2 Stats. 1891, p. 116.
3 Stats. 1893, p. 33.
4 Stats. 1867-68, p. 463.
5 Stats. 1893, p. 95.
6 See ante, sec. 5.
7 See post, Part II, c. V.
8 German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879.

lished, it is held that the assessment may be valid, although no provision for compensation has been made.[9] It is to be noted, however, that no particular formality is required for the original establishment of a grade, and that its validity is not made to depend upon payment of damages. Where an attempt is made to change a grade, and the attempt fails because of invalidity of the proceedings, a subsequent assessment, levied in a distinct proceeding for a street improvement, is not void because no compensation has been made. The finding of the street superintendent or of the city council that the work has been done to the official grade is conclusive.[10] Where, however, the council attempts to change the grade and improve the street in one proceeding, I am of the opinion that if the grade is not legally changed no valid assessment can be levied. In such a case, the work called for is work expressly required to be on a grade other than the official grade; and the acceptance by the street superintendent merely establishes the fact that the work has been done on that grade. Hence, as it appears on the face of the proceedings that the work has not been properly done, it seems to me that no valid assessment can be levied.

§ 363. **This Portion Applies Only to Change, not to Original Establishment, of Grades.**—Section 38 provides: "The city council is hereby empowered to change or modify the grade of any public street, lane, alley, place, or court, and to regrade or repave the same, so as to conform to such modified grade, in the manner as hereinafter provided." This provides only for the change of established grades and the improvement of streets thereafter. It is not broad enough to include the original establishment of grades.[11]

[9] Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

[10] See German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

[11] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

Under section 1 of the act the council is authorized to establish and change the grade of streets. No particular procedure is prescribed for the original establishment. It has been suggested that grades may be changed under section 1 as well as under section 38.[12] This rests upon the idea that section 38 and the following sections constitute a separate act. Such is not the case, however, for they are expressly made a part of the Vrooman Act. I believe they should be construed as prescribing the procedure for carrying out the general authority given by section 1 to change an established grade.

§ 364. Petition of Property Owners.—The first step in the proceedings is the filing of a petition by property owners. Section 38 provides "that no change of an established grade shall be ordered except on petition of the owners of a majority of the property affected by the proposed change of grade." Under this, a petition is essential to the validity of the proceedings;[13] and there is no legal difference between no petition and a petition lacking the substantial averments required by the statute.[14] The meaning of the words "majority of the property affected" is not altogether clear. However, where a petition purports to be by the owners of a majority of the property affected, and the council treats it as sufficient, its determination of the fact is

[12] In German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067, the court refers to the first thirty-seven sections as the Vrooman Act and to the subsequent sections as the Change of Grade Act, and says: "Besides, as counsel further shows, if, as is alleged in the complaint, ordinance No. 3620 did change the grade of these streets, the power of the council to pass the ordinance may be referred to the Vrooman Act." This is a dictum, and in my opinion is not correct.

[13] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020. See, also, Turrill v. Grattan, 52 Cal. 97; Dyer v. Miller, 58 Cal. 585; Gately v. Leviston, 63 Cal. 365, cases decided under an earlier statute.

[14] Turrill v. Grattan, 52 Cal. 97.

conclusive.[15] Thus it will be conclusively presumed that the signers constituted a majority not only at the time of signing but at the time the council acted, where it appears that the council has treated the petition as sufficient.[16] The court presumes that the council investigated the matter and decided the fact. Where a petition purports to represent the owners of a majority of the property affected, the fact that the council subsequently increases the district so that the petition does not then represent a majority is immaterial.[17] It would seem that a petition signed by the owners of a majority of the property liable to be assessed according to the front-foot rule should be sufficient.[18] Otherwise, it would be impossible for the owners to know how much of a petition to present, until the district has been definitely determined.

§ 365. **Resolution of Intention.**—Upon the filing of a petition in due form, the council passes a resolution of intention. The statute provides: "Before any change of grade is ordered the city council shall pass an ordinance or resolution of intention to make such change or modification of grade, and it shall have power at the same time and in the same ordinance or resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, or curbing of said street or portion of street, with the same or other material with which it was formerly graded, paved, sewered, sidewalked, or curbed; and that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such changed or

15 German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Spaulding v. San Francisco Homestead etc. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249. Compare Mulligan v. Smith, 59 Cal. 206; Ziegler v. Hopkins, 117 U. S. 683, 6 Sup. Ct. Rep. 919, 29 L. ed. 1019.

16 German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

17 O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

18 See O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

modified grade. One or more streets or blocks of streets may be embraced in the same ordinance or resolution." It will be noted that this provides both for the change of grade and for the work of actually making the change. For changing the paper grade the resolution of intention should contain the following: (1) A description of the new grade intended to be established, which includes, of course, a statement of the streets and boundaries thereof to be changed; (2) A description of the district declared to be benefited and to be assessed. Questions as to the sufficiency of such descriptions have already been discussed.[19] (3) A designation of a newspaper in which the resolution shall be published.[20] If it is proposed to do the work as well as to change the paper grade, the resolution should contain the following in addition: (4) A description of the work proposed. This should be as definite as that required for a resolution of intention under section 3.[21] (5) A statement that the cost shall be assessed upon the same district which is declared to be benefited by such changed or modified grade. It is not necessary that the proceeding include the actual change of the grade. After the grade has been changed the new grade is the official grade; and the council may thereafter order the work done under the general provisions of the act or under the provisions of the Bond Act.[22]

§ 366. **Description of the Grade.**—The question of the sufficiency of the description of a grade has been considered in several cases. It is sufficient if it fixes the grade at each end of a block. By connecting these points by a straight

19 See ante, sec. 88 ff.

20 See ante, sec. 90.

21 See ante, sec. 64 ff.

22 Proceedings were taken under the Bond Act in German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

line, the grade at any particular point can be ascertained.[23] It is not sufficient, however, merely to fix two points more than a block apart, without in some way designating the grade at points between.[24]

§ 367. **Notice of Intention.**—"Such ordinance or resolution shall be published in the newspaper in which the official notices of the city council are usually printed and published; and such newspaper is to be designated in such ordinance or resolution. Such publication shall be made in every regular issue of such paper for not less than ten days, and shall describe the proposed change or modification of grade or regrading, and shall designate and establish the district to be benefited by such change or modification of grade or regrading, and to be assessed for the cost of the same. Within five days after the first publication of the ordinance or resolution of intention, the superintendent of streets shall cause to be conspicuously posted within the district designated in the ordinance of [or] resolution, notice of the passage of said resolution. Said notices shall be the same in all requirements of contents and posting as the 'Notices of Street Work' provided for in section 3 of the original act to which this is amendatory." The somewhat similar requirements of section 3 have already been discussed in detail; and hence it is not necessary to go fully into the discussion here.[25] The requirement that the newspaper designated shall be the official paper is additional to the requirement of section 3; and with such a requirement, it is difficult to see why it should be necessary to designate the paper in the resolution. It is possible that the requirement as to the official newspaper may be held to be directory only.[1]

[23] Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467.

[24] Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537.

[25] The contents of the notices and the manner of posting are fully discussed ante, sec. 94.

[1] See Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173. This was an action upon an ordinary street assessment under the Vrooman Act. The

§ 368. **Same—Who Entitled.**—The constitution and the statute provide for compensation only for an owner. Hence it is necessary only to provide for notice to owners. "The consequential damages arising directly from a change of grade may be compensated only by reason of the provisions of the state constitution, or some law passed pursuant to the constitution. The constitutional provision is: 'Private property shall not be taken or damaged for public use without just compensation having been first made, or paid into court for the owner.' A mortgagee is entitled to compensation, if at all, because of this provision of the constitution, and if he object that the Change of Grade Act provides only for the filing of a petition for damages by the owner, then he must seek compensation as an owner; and if he claims that the word 'owner' does not include a mortgagee, *Lent v. Tillson* replies to him that the statute and the constitution must be read together as one law, and the statute is as broad as the constitution. It may well be asked at this point, may compensation for the same damage be awarded to both the owner and mortgagee? Certainly not. If to but one, which one? And if one damage to both, how to be apportioned? And why the necessity for providing notice to others than the owner? But the act does make ample provision for a notice to and a hearing by such persons as come within the description of those entitled to compensation."[2]

court said: "The appellant claims that the court should have permitted him to show that the San Francisco 'Daily Report,' in which the notices and resolutions concerning this assessment were published, was not the lowest bidder. We think the ruling of the court was correct. The appellant had no right in this proceeding to have the court turn aside from the question before it, and in a collateral attack determine whether or not the board of supervisors had performed its duty. The fact of due publication gave the jurisdiction to levy the assessment without regard to the paper in which it was published, except the publication must have been made in the paper designated by the council." Of course this is not expressly in point. However, it seems to me probable that the court would presume that the paper designated was the official paper.

2 German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

§ 369. Petition Claiming Damage.—Section 39 provides: "Within thirty days after the first publication of said notice, any person owning property fronting upon said portions of the street or streets where such change of grade is made, may file a petition with the clerk of the city council showing the fact of such ownership, the description and situation of the property claimed to be damaged, its market value, and the estimated amount of damages over and above all benefits which the property would sustain by the proposed change if completed. Such petition shall be verified by the oath of the petitioners or their agents." Such a petition is essential to the right to damages in this proceeding. In construing a similar provision in an earlier statute, the Supreme Court said: "We think it was the purpose of the legislature to confine the award of damages to those who should thus petition for their allowance. It will be seen that the petition must not only set forth with great minuteness and precision as well the fact of ownership as the description and situation of the property alleged to be injured; but it must, on the oath of the petitioner, state the amount of damages resulting after deducting all benefits which the particular lot of land will derive from the proposed change. A sworn estimate or calculation by the petitioner himself is thus afforded as a basis upon which the commissioners are to proceed. . . . . We think that a careful examination of the various provisions of the act will show it was not its purpose to provide for the payment of damages to those who, not claiming them, might fairly be supposed to intentionally waive them; or who could not, upon their consciences, state that they thought themselves entitled to receive them. Upon the filing of the required petition by a party supposing himself about to be damaged, all other property owners within the designated limits, who possibly might be thereafter assessed as beneficiaries, must be considered as defendants denying the statements of the petitioner, interested, of course, in reducing the amount of damages claimed by him, and they should be

afforded an opportunity to produce witnesses to disprove his allegations. But if no claim for damages be placed on file by the owner of a particular lot, the defendants are without notice to enable them to prepare to resist it; and for much the same reason, we think that the commissioners, in their award of damages to any petitioner should not exceed the amount claimed by him in the petition itself, since those adversely interested may fairly be supposed to have acquiesced in the correctness of the amount claimed in the petition itself."[3]

§ 370. **Duties of Commissioners.**—Section 40 provides that "whenever such petition or petitions have been filed, the mayor, surveyor, and superintendent of streets of the city, or city and county, acting as a board of commissioners, shall assess the benefits, damages, and costs of the proposed change of grade upon each separate lot of land situated within the assessment district, as said lot appears of record upon the last city, or city and county assessment-roll." It is to be noted that this provides for the assessment of benefits and damages only for the proposed change of grade. It does not provide for an assessment for actually doing the work. That is provided for in section 47, which we shall consider later. Section 41 requires that the commissioners shall take an oath "to make the assessments of benefits and damages to the best of their judgment and ability, without fear or favor." Section 42 authorizes the commissioners to subpoena witnesses and to administer oaths. Section 43 prescribes the duty of the commissioners in regard to the assessment. "The commissioners having determined the damage which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges, and expenses of

[3] Matter of Beale street, 39 Cal. 495. See, also, German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvement; and during the progress of their work shall make a report to such city council as often as it may be required." The right to demand reports is as far as the council can go in supervising the work of the commissioners. Apparently, the commissioners can take as long as they desire to decide the matter; and if they so desire, it would seem that they may postpone the matter indefinitely by acting slowly.

§ 371. **Report of Commissioners.**—Upon completion of their work, the commissioners are required to make a written report to the council, the contents of which are prescribed in sections 44 and 45. Section 44 provides: "The commissioners shall make their report, in writing, and shall subscribe to the same and file with the city council. In their said report they shall describe separately each piece of property which will sustain damage, stating the amount of damages each will sustain over and above all benefits. They shall also give a brief description of each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of damages assessed against the same. In case the three commissioners do not agree, the award agreed upon by any two of them shall be sufficient. In designating the lots to be assessed, reference may be had to a diagram of the property in the district affected; such diagram to be attached to and made a part of the report of the commissioners." While the diagram is not an essential part of the report, it is a convenient aid to description. The report and diagram are similar in many respects to the assessment and diagram required by section 8 for work under the district plan.[4] Section 45 provides: "If in any case the commissioners find that conflicting claims

[4] As to the assessment and diagram, see ante, secs. 209–213.

of title exist, or shall be in ignorance or doubt of the ownership of any lot or land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any land or improvements, or particulars of their interest, shall not affect the validity of the assessment." The report must either give the name of some person as owner, or assess to unknown owners. It would seem that a report which fails to do so would be insufficient. An error in the name given, however, does not interfere with the validity of the assessment.[5] Hence it is not necessary for the commissioners to exercise any diligence to ascertain the name of the owner.

§ 372. **Notice of Filing of Report.**—Section 45 further provides for notice of the filing of the report. "On the filing of said report, the clerk of said city council shall give notice of such filing by the publication of at least ten days in one or more daily newspaper published and circulated in said city; or if there be no daily newspaper, by three successive issues in a weekly or semi-weekly newspaper so published and circulated; and said notice shall require all persons interested to show cause, if any, why such report should not be confirmed, on a day to be fixed by the city council and stated in said notice, which day shall not be less than twenty days from the first publication thereof." This requires the council to fix a day upon which objectors may show cause before the notice is given. The statute does not expressly require a publication in a newspaper designated by the council; and it is probable that neither such a designation nor a resolution directing publication is necessary. It is better practice, however, for the council, in its order fixing time, to direct the clerk to give notice in the

[5] See Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377, applying a similar provision in one of the street opening acts. In this respect the report differs materially from the assessment required by section 8.

manner prescribed by statute, and to designate the newspaper in which it shall be published.

§ 373. **Objections, and Notice of Hearing.**—Section 46 requires that "all objections shall be in writing and filed with the clerk of the city council, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the city council, which shall fix a time for hearing the same." These objections must be filed not later than the day stated in the notice. The wording of section 45, requiring objectors to show cause on a day fixed, does not, in my opinion, mean that the objections cannot be filed before that time.[6] Upon the analogy of the rule applicable to protests filed under section 3, it seems to me that the objection may be filed at any time after the filing of the report and up to and including the day fixed. No particular form is required for the objections, nor is there any provision as to their contents. What has already been said as to the form of protests and appeals is, in general, applicable here.[7] Notice of the time of hearing must be given "in the same manner as are notified objectors to the original resolution of intention." If by "original resolution of intention" is meant the resolution of intention to change the grade, this is meaningless; for there is no provision for notice to objectors to such a resolution. If it means the resolution of intention provided for in section 3, however, the notice must be given by mailing. It seems clear that the legislature intended notice to be given only to the objectors. Hence, the provisions for notice of the passage of the resolution of intention to change the grade and of the filing of the report are certainly not referred to. It is a general principle that where the manner of giving notice is not prescribed, personal service is necessary. Hence, I believe it to be the safest practice to mail notice

[6] See Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262.

[7] See ante, sec. 100 ff.

to each objector and, where possible, to make personal service as well.

§ 374. **Hearing and Determination.**—Section 46 provides that "at the time set, or at such other time as the hearing may be adjourned, the city council shall hear such objections and pass upon the same, and at such time shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given and had, as in the case of an original report." The jurisdiction here granted is practically the same as that conferred upon the council upon an appeal from an assessment, under section 11.[8] The effect of the adoption of the report is to fix the amount of compensation to which the parties damaged are entitled. In a case decided under an earlier statute, it was held that the adjustment, in the absence of fraud, was conclusive; and that the jurisdiction of courts to interfere must be confined to errors of jurisdiction and irregularities appearing on the face of the proceedings themselves.[9] This rule, apparently, does not apply to proceedings under this act; for section 51 provides for condemnation proceedings in cases where the owner refuses to accept the proffered compensation.

§ 375. **When Change Takes Effect.**—The time when the change of grade takes effect in cases where no petitions for damages are filed is stated in section 38. "If no objection to said proposed change or changes, or modifications of grade, shall be filed with the clerk of the council within thirty days from the first publication of the ordinance or resolution of intention hereinbefore mentioned, the city council shall have power to declare such grades to be changed and established in conformity to said ordinance or

[8] See ante, sec. 262.

[9] Matter of Beale street, 39 Cal. 495.

resolution." The time when it takes effect in cases where petitions for damages are filed is not expressly stated in the statute. Section 46 authorizes the council to confirm, correct, or modify the report of the commissioners. It would seem probable that the change takes effect from the date of the confirmation of the report. Such was the rule under a former statute; but that statute contained an express provision to that effect.[10] Under the terms of section 46, the council is authorized to proceed to have the street improved immediately after the report is confirmed. From this, it would seem that the change takes effect at the time stated.

§ 376. **Procedure for Award of Contract.**—The procedure for awarding contracts to perform the work of changing the grade and paving the street is prescribed in section 46. "In case the ordinance or resolution of intention also provides for assessing upon the district the cost of regrading or repaving such street or streets to such changed or modified grade, after the report of the commissioners as to the damages caused by such change of grade has been passed upon by the city council, it shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking, or curbing such street or streets with the same or other material with which the same had been formerly graded, paved, sewered, sidewalked, or curbed." It then proceeds to prescribe the same procedure prescribed by section 5 for advertising for bids and awarding the contract for the work. Hence it will not be necessary to repeat what has been said in regard to that procedure.[11] It is to be noted, however, that before advertising for bids, the council must adopt specifications for the work. It must also pass a resolution directing that notice calling for bids be given, and designating the newspaper in which it must

10 Matter of Beale street, 39 Cal. 495.

11 See ante, sec. 134 ff.

be published. The last sentence of the section reads: "Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore provided for the posting of proposals for said work." The wording of this is awkward, but it undoubtedly is intended to require both posting and publication. This requirement is an instance of following another statutory provision without considering the reasons for the original provision. Section 5 requires notice of the award of contract so that property owners may come in and take the work themselves. There is no such provision here; and there would seem to be no reason for requiring any notice whatever of the award of the contract.

§ 377. **The Contract.**—No provision is made in this portion of the act for actually entering into the contract for the work; nor are the contents of the contract here prescribed. Section 6 provides: "The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act." This provision seems broad enough to empower the superintendent of streets to enter into a contract awarded under the terms of section 46. Section 6 provides the terms that shall be inserted in contracts; and it would seem that the same provisions should be inserted in contracts awarded under section 46.[12] Section 52 provides that "all other provisions contained in the act to which this is amendatory, and which provisions are not in conflict herewith, shall apply to all matters herein contained." This seems to authorize the application of the prior provisions as to the contract.

§ 378. **Assessment for the Work.**—The procedure for making the additional assessment for the cost of actually

[12] In general, as to the terms of contracts, see ante, sec. 160 ff.

doing the work is prescribed in part by section 47. "After such contract has been awarded and entered into, the clerk of the city council shall certify to the city council that fact, together with the total amount of the cost of the same, whereupon the city council shall cause to be forwarded to the commissioners a copy of such certificate; whereupon such commissioners shall proceed to assess the cost of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the same, according to the benefits it receives from the work, and in the same manner in which the damages caused by the change of grade were assessed upon the same. Such commissioners, in making such assessment, shall show the total amount for which each lot or tract is assessed, in excess of all benefits, for the total cost of changing and modifying the grade of the street, as well as the regrading, repaving, sewering, sidewalking, and curbing of the same, and costs or damages connected therewith. The provisions of the act to which this is amendatory in regard to the mode or manner of the assessment of the cost of such work shall not apply to the work herein contemplated; neither shall the provisions of the same in regard to the issuing of bonds to represent the cost of the same, nor the provisions in regard to the right of protest against the work." The procedure is similar to that prescribed for making the assessment for damages. As preliminary, there are just two matters necessary: (1) A certificate of the street superintendent that the contract has been entered into; (2) a resolution directing that a copy of the certificate be forwarded to the commissioners. It is to be noted that there is no provision for a report to the council by the commissioners, no provision for notice of filing a report, and no provision for a hearing thereon. Section 48, however, refers to the report "as finally confirmed and adopted by the city council." It is evident, therefore that the act contemplates a report, and action

thereon. Section 47 provides that the commissioners shall assess each lot "in the same manner in which the damages caused by the change of grade were assessed upon the same." I believe this is capable of the construction that the same procedure is to be adopted to make the assessment final as is prescribed for the first assessment. It is only upon such construction that the provision can be made reasonable. Its effect is to require a report, notice thereof, a hearing, and a determination.

§ 379. **Lien of the Assessment.**—The final procedure to make the assessment a lien is prescribed by section 48. "The clerk of said city council shall forward to the street superintendent of the city a certified copy of the report, assessment, and plat, as finally confirmed and adopted by the city council. Such certified copy shall thereupon be the assessment-roll, the cost of which shall be provided for by the commissioners, as a portion of the cost of the proceedings therein. Immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein." This apparently is intended to apply to the final assessment, whether the proceedings provide for actually doing the work or not. Where the proceedings are merely to change the paper grade, the adopted report of the commissioners in the first instance is the assessment as finally confirmed and adopted by the council.

§ 380. **Collection of the Assessment—In General.**—The mode of collecting the assessment is very different from that prescribed for collection by sections 9 and 12. The amount due must be paid to the superintendent of streets, without any demand, other than by publication. The proceeding is quite similar to that provided for the collection of state and county taxes, upon which it was apparently based.

Section 49 provides: "The superintendent of streets shall thereupon give notice, by publication for ten days in one or more daily newspapers published and circulated in said city, or city and county, or two successive insertions in a weekly or semi-weekly newspaper so published or circulated, that he has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of such delinquent assessment, together with the cost of advertising each delinquent assessment will be added thereto. When payment of any assessment is made to said superintendent of streets, he shall write the word 'Paid' and the date of payment opposite the respective assessment so paid, and the name of the persons by or for whom said assessment is paid, and shall give a receipt therefor. On the expiration of said thirty days, all assessments then unpaid shall be and become delinquent, and said superintendent of streets shall certify such fact at the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent."

§ 381. **Same—Sale.**—Section 49 then provides for the collection of delinquent assessments: "The said superintendent of streets shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece, or parcel of land separately assessed, by the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes; and after the date of said delinquency, and before

the time of such sale herein provided for, no assessment shall be received, unless at the same time the five per cent added to as aforesaid, together with the costs of advertising then already incurred, shall be paid therewith. Said list of delinquent assessments, with a notice of the time and place of sale of the property affected thereby, shall be published daily for five days, in one or more daily newspapers published and circulated in such city, or by at least two insertions in a weekly newspaper so published and circulated before the day of sale for such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment-list, and the place must be in or in front of the office of said superintendent of streets. All property sold shall be subject to redemption for one year, and in the same manner as in sales for delinquent state and county taxes; and the superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale a deed conveying the property sold, and may collect for each certificate fifty cents, and for each deed one dollar. All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes, in force at any given time, shall also then, as far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds. The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee."

§ 382. **Same—Same—Application of Provisions Relating to General Taxation.**—It will be noted that the foregoing provides for sales "in the same manner as is or may be provided for the collection of state and county taxes"; and that it also adopts "all provisions of the law in reference

to the sale and redemption of property for delinquent state and county taxes, in force at any given time, ... as far as the same are not in conflict with the provisions of this act." After this act was passed, the legislature amended the tax law by requiring all sales for delinquency to be made to the state. It would seem that this new provision is inconsistent with the act, and hence does not govern. In passing upon a somewhat similar provision in another act, the Supreme Court said: "A comparison of the act of 1893 with the provisions of the Political Code, as amended in 1895, shows that the provisions in the latter thus amended are entirely inapplicable to the former, and ineffective to carry its objects into effect. The provision in section 5 above quoted was to enable the contractors to receive the amount of the assessment as the several installments should mature, and to provide means for enforcing its collection in case of delinquency. The provision for a sale of the land at public auction to anyone who would pay the assessment, with the right in the contractor to become such purchaser, was an efficient mode of securing such payment, but if, instead thereof, the land should be struck off to the state with no power for its sale within five years, and no fund from which to pay the amount for which the sale was made, there would be no means by which the contractor could receive his payment, and the entire purpose of the act would be frustrated. We hold, therefore, that the above amendments to the Political Code in 1905 are inapplicable to the provisions of the act of February 27, 1893, and that the sale of land for delinquency in the payment of the bond is to be made according to the provisions of the law for the collection and enforcement of taxes at the date of that act."[18] There may be a question as to whether the provisions in force in 1893 are applicable, for this statute expressly purports to adopt provisions in force at any given time. However, it

[18] Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

would seem certain that the provisions for a sale to the state do not apply. This section is almost identical with section 16 of the Street Opening Act of 1889. The procedure is discussed in detail in a later chapter.[14]

§ 383. **Payment of Damages.**—The disposition of the money received by the superintendent of streets is governed by the latter part of section 49 and by section 50. Section 49 provides: "The superintendent of streets shall from time to time pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating each fund by the name of the street, square, lane, alley, court, or place for the change of grade for which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners or a majority of them." Section 50 provides: "When sufficient money is in the hands of the city treasurer, in the fund voted for the proposed work or improvement, to pay the total cost for damages, as well as for the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which can be received at the office of such commissioners. Such notification may be made by depositing a notice, postage paid, in the postoffice, addressed to his last known place of residence. If, after the expiration of three days after the service or deposit of the notice in the postoffice he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer, to be delivered to him upon demand."

§ 384. **Acceptance—Appeals.**—It will be noted that there is no express provision for acceptance of the work, nor for

[14] See post, sec. 703 ff.

an appeal by the property owner in case of defective work. Section 52, however, provides "that all other provisions contained in the act to which this is amendatory, and which provisions are not in conflict herewith, shall apply to all matters herein contained." It would seem from this that the provisions in the earlier part of the act as to acceptance and appeal, so far as consistent with the procedure here provided, apply.

§ 385. **Eminent Domain Proceedings.**—Section 14 of article I of the state constitution provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner." The Supreme Court has held that this contemplates a proceeding in court, and that no other proceeding is sufficient.[15] The owner is entitled to a jury trial for the purpose of ascertaining the amount of damage he will suffer. It follows that the proceedings provided by this act are not sufficient to compel an owner to accept proffered compensation, without resort to a court proceeding. For this reason, section 51 provides a court procedure for cases where the owner refuses the amount allowed. That section provides: "If the owner of any premises damaged neglects or refuses, for ten days after the warrant has been placed in the hands of the city treasurer, subject to his demand, to accept the same, the city council may cause proceedings to be commenced, in the name of the city, to condemn said premises, as provided by law under the right of eminent domain. The ordinance or resolution of intention shall be conclusive evidence of the necessity of the same. Such proceedings shall have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of the special fund in the treasury for that purpose. At any

[15] Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin County, 59 Cal. 320.

time after the trial and judgment entered, or pending appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum from said fund to answer the judgment, and thereupon may authorize or order the municipality to proceed with the proposed work or improvements. In case of a deficiency in said fund to pay the whole assessed judgment and damages, the city council may, in its discretion, order the balance thereof to be paid out of the general fund of the treasury, or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last named case, in order to avoid delay, the city council may advance such balance out of any available fund in the treasury, and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation; provided, that warrants for damages and for costs of performing the work shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money remains in the fund to pay all warrants of the first class before paying any of the second. The provisions of section 1251 of the Code of Civil Procedure, requiring the payment of damages within thirty days after the entry of judgment, shall not apply to damages rendered in proceedings under this act."

CHAPTER II.

THE BOND ACT.

DIVISION 1.

PROCEDURE IN ORDINARY CASES.

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§ 386. History of the Act.—The Bond Act, in substantially its present form, was adopted in 1893. Its exact title

is, "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 7, 1893. In 1891, an act in most essentials the same as the original act of 1893 was passed, making these provisions an integral part of the Vrooman Act.[1] These sections of the Vrooman Act were repealed by section 8 of the act of 1893. In 1899, sections 2, 3, 4 and 5 of the Bond Act were amended, the principal changes being as follows: (1) The authorization of bond issues when the expense was estimated to be more than fifty cents per front foot, instead of one dollar per front foot.[2] (2) The authorization of bonds for assessments of twenty-five dollars or more.[3] (3) Bonds were made prima facie evidence instead of conclusive.[4] (4) Sales were required to be made according to the procedure set forth in section 5, instead of according to the procedure provided for sales for delinquent state and county taxes.[5] In 1911, sections 2 and 4 were amended. The principal changes were: (1) Bonds may now be issued to represent any assessment of twenty-five dollars or more. No estimate of cost is necessary. (2) The bond is now made conclusive evidence of the validity of the proceedings.

§ 387. **Nature of the Act.**—The Bond Act is supplementary to the Vrooman Act, and applies only to proceedings under that act. Section 2 confers general jurisdiction, as follows: "The city council of any municipality in this state shall have power, in its discretion, to determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or

1 Stats. 1891, p. 116.
2 See sec. 2.
3 See sec. 3.
4 See sec. 4.
5 See sec. 5.

over for the cost of any work or improvement authorized by the said Street Work Act." The words "Street Work Act" are defined by section 1 to mean the Vrooman Act. "Wherever in this act the phrase 'Street Work Act' is used, it means, and shall be taken to mean, the act entitled, 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for construction of sewers within municipalities,' approved March eighteenth, eighteen hundred and eighty-five, and all acts amendatory thereof or supplementary thereto; and wherever in this act the name of any municipal body or officer is used, or any word or phrase is used which is not herein expressly defined, it means and shall be taken to mean such municipal body or officer, or word or phrase, as the same is expressly defined in said Street Work Act, and in all acts amendatory thereof or supplementary thereto."

§ 388. **Outline of the Procedure.**—This act provides for the issuance of bonds in two classes of cases: (1) Where for ordinary street work under the Vrooman Act the council deems the issuance of bonds to be proper; (2) where a railroad company fails to improve the portion of the street which it is required by law to keep in order. In the first case, the procedure required by the Vrooman Act must be followed, with several changes and additions. In outline, these are as follows: (a) The resolution of intention must state a determination to issue bonds, and must specify the rate of interest. (b) A like description of the bonds must be inserted in the resolution ordering the work, in the resolution of award, and in all notices of the proceedings required to be posted or published. (c) A notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid, and a description of the bonds must be inserted in the warrant. (d) After thirty days from the date of the warrant, or, if an appeal is taken, five days after the determination of the appeal,

and after the return has been recorded, the superintendent of streets must make and certify to the city treasurer a complete list of unpaid assessments, for which bonds must be issued. (e) Bonds must then be made in the form prescribed and delivered to the contractor or his assigns. Each bond describes one of the parcels upon which the assessment has not been paid, and is a lien upon that parcel only. (f) Upon default in the payment of principal or interest by the owner of the land charged, the land must be sold according to the procedure prescribed in section 5. The procedure in the second class of cases is prescribed in section 6, and will be outlined later.

§ 389. **Constitutionality—In General.**—The bonds are a municipal obligation. Speaking of the nature of such bonds under the act immediately preceding the present act, which was similar in most respects, the Supreme Court said: "Liens upon property, where no person is bound to perform the obligation, are common in our law, especially in cases of taxation; and in cases of this character no personal liability can constitutionally be imposed upon the property owner. But if these bonds could not be considered municipal obligations, the result would be the same. So far as the questions in this case are concerned, the bonds really cut no figure, and might as well be eliminated from the case. The effect of the act in question is precisely the same, so far as the property owners are concerned, as if it had provided that any delinquent assessment of fifty dollars or more should be payable in annual installments for such number of years, not exceeding ten, as the council should fix, with interest at a rate to be determined by the council, and that, upon default in the payment of any installment, the property should be sold to pay the assessment. Since the legislature might constitutionally have provided (as it did provide in the original Vrooman Act) that the property should be sold at once to pay the entire

delinquent assessment, the owner cannot complain of a provision allowing him an extension of time within which to pay any installment. The only possible question could be as to the authority of the council to fix the rate of interest. We agree with counsel for respondents that the imposition of interest may well be supported as a legitimate penalty for delinquency, from which the owner may protect himself by paying the assessment when due. As to fixing the rate of interest, that is a matter of contract merely. The city council is authorized to contract for the doing of the work, and must, in its resolution of intention, fix the rate of interest. This is one of the terms upon which bids are invited, and presumably enters into the price bid. If the rate of interest as fixed is high, the presumption is that the price bid will be proportionately low. We can, therefore, see no such inequality as to affect the uniform operation of the law, or to distinguish this case from the ordinary class of municipal contracts for street work."[6] The act is not void because it imposes a lien for a long period of years;[7] nor does it violate any of the constitutional provisions as to uniformity, nor as to the necessity for general laws.[8] Nor is it void because the right to object to the proceedings is not expressly given to lienholders. "If a mortgagee can be heard to complain, so could a leasehold owner or any other person having any interest, however slight, present or prospective."[9] Nor is it an improper delegation of legislative authority.[10]

§ 390. Same—Not in Violation of Prohibition of Amendment by Title.—It has been suggested that the act may be

[6] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

[7] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

[8] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

[9] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

[10] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

unconstitutional on the ground that it is violative of that provision of section 24 of article IV of the constitution, which declares that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."[11] Upon this point, the Supreme Court, in passing upon the act immediately preceding this, said: "It is evident that if this amends the Vrooman Act at all, it does so only by implication. It does not purport to amend any section of that act. It simply adds new sections as a whole relating to a subject which is stated. As already said, every word and sentence of the prior act is left in full operation and effect; although if this were otherwise, it would not therefore be an amendment. By implication it affects the operation of the Vrooman Act, for it empowers the board in certain cases to adopt an alternative procedure. But, although it may be admitted that in a sense this amends the prior law, it is not within the evils aimed at by the inhibition, and to apply it to statutes which amend others by implication would almost prohibit legislation. To say that every statute which thus affects the operation of another is therefore an amendment of it would introduce into the law an element of uncertainty which no one can estimate. It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws."[12]

§ 391. **Same—Title of Act.**—It has been further suggested that this act violates the constitutional requirement that "every act shall embrace but one subject which subject shall be expressed in its title."[13] As to the sufficiency

11 See Finlayson on Street Law, p. 220.

12 Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

13 Finlayson on Street Law, p. 233. Mr. Finlayson's argument is that section 6, relating to assessments for work between railroad tracks, is a separate and distinct matter; that this is the only procedure provided

second day of January and July, respectively, of each year, at the rate of not to exceed ten per cent per annum on all sums unpaid, until the whole of said principal and interest are paid."

§ 394. **Additional Statements in Other Resolutions and Notices.**—After providing for additional statements in the resolution of intention, section 3 provides: "The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by said Street Work Act to be either posted or published." Under this, the same wording that is used in the resolution of intention may be used in the subsequent proceedings.

§ 395. **Contents of the Warrant.**—Section 3 requires that "a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, and describing the bonds, shall be included in the warrant provided for in section 9 of said Street Work Act." It is not necessary to set out the bonds in full in the warrant. The following notice has been held sufficient: "Serial bonds bearing interest at the rate of six per cent per annum and extending over a period of ten years from their date of issue, to represent the costs and expenses of the work described in the assessment, and in the manner and form prescribed by law, and notice is hereby given that a bond in such series will issue to represent each assessment of [twenty-five] dollars or more, remaining unpaid for thirty days after the date of this warrant, or five days after the decision of the city council upon an appeal."[19]

[19] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. Prior to the amendment of 1899, a bond issued for each assessment of fifty dollars or more.

§ 396. Certification of List of Unpaid Assessments.— With the additions already noted, the proceedings under the Bond Act follow the Vrooman Act through the requirement of the recording of the return. After that, however, the proceedings are governed entirely by sections 4 and 5 of the Bond Act, except in the cases where collection is to be enforced by suit. Section 4 provides: "After the full expiration of thirty days from the date of the warrant, or if an appeal be taken to the city council, then five days after the final decision of said city council, and after the street superintendent shall have recorded the return, the street superintendent shall make and certify to the city treasurer a complete list of all assessments unpaid, which amount to twenty-five dollars or over, upon any assessment or diagram number." The object of this is to give the city treasurer the information necessary to enable him to issue the bonds; and it would seem clear that without it, no bonds can be issued. It would also seem to follow that bonds can be issued only for the assessments shown on the list as unpaid. It has been held that the words "from the date of the warrant," as used in the Vrooman Act, mean from the date the warrant is recorded, and not from the date it bears on its face;[20] and it would seem that the words should be given the same construction here. It is the duty of the superintendent of streets to make and certify the list immediately upon the expiration of the time stated; and if he fails to do so, he can undoubtedly be compelled by mandamus. The statute does not prescribe any time before which the list must be made. The contractor is certainly entitled to have a proper list certified; and if the superintendent makes an error in the first list, he should correct it by a second. The contractor cannot be made to suffer through an error of the street superintendent committed after the work has been done.

[20] See ante, sec. 239.

§ 397. **Issuance of Bonds.**—Upon receipt of the list the "treasurer shall thereupon make out, sign, and issue to the contractor, or his assigns, payee of the warrant and assessment, a separate bond, representing upon each lot or parcel of land upon said list the total amount of the assessments against the same, as thereon shown." The bonds must be substantially in the form set forth in section 4. "The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work. They shall have annual coupons attached thereto, payable in annual order, on the second day of January in each year after the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, the first of which shall be payable upon the second day of January or July, as the case may be, next after its date, and shall be for the interest accrued at that time, and the last of which shall be for the amount of interest accruing from the second day of January or July, as the case may be, next preceding the maturity of said bonds to the maturity thereof."

§ 398. **Description of Property in Bond.**—The bond is a lien upon specific property, and must contain a description of such property sufficient to identify it. Section 4 provides that "if said lot or parcel of land is described upon said assessment and diagram by its number or block, or both, and is also designated by its number or block, or both, upon the official map of said municipality, or upon any map on file in the office of the county recorder of the county in which said municipality is situated, then it shall be in said bond a sufficient description of said lot or parcel of land to designate it by said number or block, or both, as it appears on said official or recorded map." This pro-

vision is in accord with the general rule applicable to deeds, that any description by lot and block, together with a reference to a map on file showing such lot and block, is a sufficient description,[21] unless there is an express requirement of a metes and bounds description. The reference must be to a map on file. It has been held in regard to an assessment which described the property by lot and block without reference to a map that the court will not take judicial notice that there is an official map or any other map, and that the property owner is not chargeable with knowledge of it.[22]

§ 399. **Date of Bond.**—The bonds should be dated as of the date when they should have been issued. Upon this point the Supreme Court has said: "Assuming the warrant to be returned within thirty days of its date, and that the officers acted promptly, the bonds will be issued on expiration of the thirty days from the date of the warrant, and they must be regarded, therefore, as due on that date. Naturally, however, and often from necessity, delays will occur; and such were doubtless contemplated by the statute. But it cannot be supposed that it was the intention of the legislature that the rights of the contractor should be affected thereby. The case is one, therefore, for the application of the doctrine of relation, and the bond, whatever be the date of its actual issue, must be regarded as taking effect, and must therefore be dated as of the date of its proper issue. And this is very clearly implied in the form of the bond given in the act, which makes the interest and the term of the bond to run 'from its date.' Hence, in order to give effect to the assessment,—which, with accrued interest, is declared to be a lien upon the property affected thereby,—the bond must necessarily be

21 See McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

22 Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042.

dated as of the date on which the assessment becomes due."[23]

§ 400. **When Bonds must not be Issued.**—Section 4 prescribes two classes of assessments for which bonds shall not issue. (1) "In case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is provided in said Street Work Act." This provision is mandatory. A bond is not authorized in such a case, and if issued is clearly void. The assessment must be enforced by suit, as provided by section 12 of the Vrooman Act. (2) "If any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records that he is such owner of record, and with such affidavit and certificate such person notifies said treasurer in writing that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection as if said lot or parcel of land had not been so listed by the street superintendent." By the terms of this, the owner has an absolute right to prevent the issuance of a bond. Where he files the notice and affidavit required, the contractor must resort to a suit to foreclose the lien in the manner provided by section 12 of the Vrooman Act. In such a suit, the owner may set up any defects in the proceedings which preclude a right of recovery in proceedings under the Vrooman Act alone.[24] This provision is of great value to the owner; for if the bond is issued, it is a more difficult matter to clear his title.

23 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

24 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

§ 401. Effect of Conclusive Evidence Clause—In General.—Section 4 provides: "Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said Street Work Act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent, to the city treasurer, and of the validity of said lien, up to the date of said list." This is similar to the original provision. In 1899 section 4 was amended so as to make the bond prima facie evidence only.[25] The original provision has been interpreted by the courts, and is held valid in so far as it does not attempt to make any jurisdictional matter unnecessary. The principles are well stated in a leading case: "In Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920, we held that this clause of the Bond Act was constitutional in so far as it does not estop inquiry concerning those parts of the proceedings which are essential. It is there said that it may be regarded as settled that the legislature may make a tax deed or street bond 'conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise—such as the listing or assessment of the

[25] Creed v. McCombs, 146 Cal. 449, 80 Pac. 679. The effect of the change of the statute was considered in the recent case of Lantz v. Fishburn, 12 Cal. App. Dec. 667 (decided May 8, 1911), where the court said: "In the absence of limiting words in the statute expressing a contrary intention, the provision making the bonds conclusive evidence of the regularity of the proceedings up to a certain point, is given a reasonable and fair construction by holding that it was the intention of the legislature to affect a right of property and not to establish a mere rule of evidence." Accordingly, it was held that the amendment of 1899 did not affect the conclusiveness of proceedings had before that time.

property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor—the legislature cannot deprive the owner of the right to show want of compliance.' There has been some confusion as to the significance of the word 'jurisdictional' in this and other decisions on the subject. The respondent appears to claim that every act required by law to be done by any person, officer, or body in the course of the proceeding is 'jurisdictional' in the sense here intended, so that its omission or defective performance ousts jurisdiction and renders all subsequent acts void, and that none of these irregularities are affected by the curative clause. It can be easily shown that this would make the curative clause without substantial effect. By section 11 of the Vrooman Act any person affected by the improvement, or by the assessment, is given the right to appeal to the council and thereby obtain a hearing and determination as to any defect in the performance of the work or irregularity in the assessment whereby he may be injured or prejudiced. By a long line of decisions it has become the settled doctrine that, with respect to any material defect or irregularity which could be cured by the council, the remedy by appeal is the only remedy; so that if the party does not appeal, he waives the objection, and if he does appeal, the judgment of the council is conclusive. As to this entire class of defects and irregularities, therefore, the curative clause could not have been intended to have any effect, for, as shown above, they must all have been disposed of, either by a failure to appeal, or by action of the council upon such appeal, before the issuance of the bonds—the event which brings into action the curative clause. As to all other irregularities up to the issuing of the warrant—those which are material, and which cannot be remedied by the council—another series of decisions has established the principle that they are fatal, and render the entire proceeding void. In treating of this class of irregularities the requirements of the law found to have

been disregarded have been frequently referred to as 'jurisdictional' in character, and this without regard to whether they were or were not a part of the proceeding constituting, or necessary to constitute, a compliance with the mandates of the state or federal constitution, the intention evidently being merely to express the idea that the statute made the requirement a material and essential part of the statutory plan of procedure. Respondent now claims that this class of irregularities is not affected by the curative clause. These two classes comprise all the material irregularities that can possibly occur, except the few that might occur after the recording of the assessment and before the making of the certified list of assessments unpaid,—that is, irregularities or omissions in the demand and collection of the amount due upon the land assessed. Immaterial omissions or defects would not invalidate the proceeding nor call for any curative provision. With the trifling exception above mentioned, there would be no class of irregularities upon which the conclusive evidence clause could have the slightest effect. It is not to be supposed that the provision was intended to be so futile. It is clear that the clause was intended to have a much wider scope and to cover any irregularity in the entire proceeding. The true intent is put beyond doubt in Ramish v. Hartwell, and by the authorities cited in that case in support of the proposition above quoted, and by other authorities on the subject. In Ensign v. Barse, 107 N. Y. 338, 14 N. E. 400, 15 N. E. 401, the court says, speaking of a subsequent validating act: 'If the thing wanting or omitted which constitutes the defect is something the necessity for which the legislature might have dispensed with by prior statutes, or if something has been done, or done in a particular way, which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute.' "[1]

[1] Chase v. Trout, 146 Cal. 350, 80 Pac. 81. See, also, Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816. In general, as to conclusive presumptions, see 36 Am. St. Rep. 686–689, note.

§ 402. Same—Continued.—"What, then, are the essentials the nonobservance of which cannot be cured? The property must be within the jurisdiction of the local board; there must be the actual performance of some work which is to be paid for, that is, a 'subject matter' of which the council can acquire jurisdiction; an assessment or apportionment of the amount to be raised must be made; and, as above stated, there must be sufficient notice and opportunity for the hearing and determination of grievances and objections to constitute due process of law. In some cases relating to ordinary annual taxes it is said there must be some notice of same, and this is among the essentials mentioned in Ramish v. Hartwell. But these decisions do not apply to local assessments under our statute, where notice of sale is provided for by the requirement that a sale can be made only in execution of a judgment of foreclosure, in which the law for ordinary execution sales applies. . . . . It is obvious that the manner of procedure after the council has acquired jurisdiction to order the work done—the entire subject of letting the work, executing the contract, completing the work, and the minor details as to the mode and manner of making the assessment—are matters within the legislative discretion. If a plan entirely different in detail from that contained in the statute, but arriving at the same result, had been adopted by the legislature for the accomplishment of these objects, and had been enacted as law instead of the one embodied in the statute, such law, from a constitutional point of view, would have been a valid enactment. There is nothing in the constitution which made the plan adopted a necessary one in these particulars. The legislature could at any time amend the law by omitting all the details after jurisdiction is acquired, and giving the council general power to get the work done by such means and in such manner as it deems best, and the law would still be constitutional. It must be equally competent to provide, in the law itself, that a disregard of its provisions as to any of these intermediate

proceedings shall not be fatal to the validity of the assessment, or that after a given stage in the matter has been reached, all inquiry as to such proceedings shall be cut off, and they shall be conclusively presumed to have been performed in the manner required by the law."[2]

§ 403. **Same—Curable Defects.**—Applying the foregoing principles, it has been held that the following defects are curable: "That the time for the completion of the work was extended after the time first fixed had expired; that the notice of the time of receiving bids for the contract was not posted or published for the precise number of hours or days which plaintiff claims the law directs; that the contract did not contain a provision that the materials used should comply with the specifications; that the street superintendent recorded the assessment but did not properly certify to such record; that the time for beginning work under the contract was not precisely fixed by the contract; and that the certificate of the engineer does not show that he measured the work"; that the specifications delegated to the street superintendent powers which the law vests in the council.[3]

§ 404. **The Lien.**—The only provision as to the duration of the lien is contained in section 4, where it is said that "said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon shall be fully paid." This makes the matter clear so far as the lien of the bonds is concerned. It would seem, in cases where no bond is issued, that the lien should be held to exist only for the two years allowed by the Vrooman Act. It seems to me clear that the legislative intent was to extend the lien only where bonds are issued. The lien is prior to all other liens,[4] except those

[2] Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

[3] Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

[4] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

for general taxation; and it is no objection to the validity of the act that it makes the bond lien prior to the lien of a mortgage existing at the time the proceedings were commenced.[5] Where bonds are issued, "there is no authority given to the city treasurer or to the bondholder under the Street Bond Act to bring any action to compel payment from the property owner of the amount of the assessment; the only method of enforcing payment provided for is that of subjecting the property to a public sale. Therefore, no statute of limitations is made to run against the collection of the assessment by such means."[5a]

§ 405. **Rights of Holder of Invalid Bonds.**—Where bonds are prematurely issued, the bondholder becomes assignee of the contractor, and is entitled to receive payments of the assessments when issued, and to demand bonds if payment is not made within thirty days. Until a valid assessment is made, however, there is no lien.[6]

§ 406. **Payment of Bonds.**—The bonds, as we have seen, are a municipal obligation, and are paid as such. Section 2 provides: "Said bonds and interest thereon shall be paid at the office of the city treasurer of said municipality, who shall keep a fund designated by the name of said bonds, into which he shall receive all sums paid him for the principal of said bonds and the interest thereon, and from which he shall disburse such sums, upon the presentation of said coupon; and under no circumstances shall said bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee and indorsees of each bond, and the number and amount of each coupon or principal or interest paid by him, and shall

[5] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

[5a] Lantz v. Fishburn, 12 Cal. App. Dec. 667 (decided May 8, 1911).

[6] Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.

cancel and file each coupon so paid." The provision for a record of the payment is made by section 4, which provides: "The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid." It will be noticed that this appears to apply only to coupon payments, and not to payments by the owner. It seems a peculiar situation that an owner may pay in full and still not have the assessment canceled until the bondholder sees fit to present his coupons.

§ 407. **Payments by Owner.**—The Bond Act does not expressly prescribe the time when the owner shall pay installments of principal and interest. Such payments must be made, however, in time for the payment of the coupons; for if the coupons are not paid when due, the bondholder is entitled to demand that the property be sold. There is no provision for paying the principal of the bonds before maturity. The bondholder is entitled to receive the full amount of interest for the full time. For this reason, this act is of questionable benefit to the land owner. A long time lien which he can satisfy before maturity only by paying a large amount of unearned interest ties up his property in such a way that he frequently will find difficulty in disposing of or encumbering it. There is a way, however, by which he can frequently induce acceptance before maturity, and that is by making default in payment. If the bondholder then endeavors to force payment by sale of the property, the owner may come in, pay the principal, accrued interest, and costs, and obtain a discharge of the lien.

§ 408. **Right to Cancellation of Bond.**—Upon payment of the amount due, the owner is entitled to have the bond canceled.[7] He is not entitled to have it canceled after a sale,

[7] See sec. 5, subd. g.

however, until redemption. The Supreme Court, in refusing a writ of mandate to compel the cancellation of a bond, said: "There is only one indebtedness and one creditor, and when that indebtedness is discharged it also discharges everything in the nature of an encumbrance securing that indebtedness held by the creditor. The right to redeem is optional, and may never be exercised. If it is exercised it will cost the same to redeem whether the bond is previously canceled or not. The bond is not a lien upon the right to redeem, and can only become obnoxious to the financial interests of plaintiffs when they shall have exercised their right of redemption and shall have been thus reinvested with the unencumbered title to the property. Then, and not till then, can they claim that they are injured by the failure to cancel the bond."[8]

§ 409. Sale for Delinquency—In General.—Section 5 provides: "Whenever, through the default of the owner of any lot or parcel of land to represent the assessment upon which such bond has been, or may hereafter be, issued, any payment, either upon the principal, or of the interest, has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond thereupon demands, in writing, that the said city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent." This is an accelerated maturity provision dependent upon the option of the holder of the bond. A written demand for a sale is a condition precedent to the maturity of the obligation under this provision, and of the duty of the treasurer to sell.[9] The treas-

[8] Ellis v. Workman, 144 Cal. 113, 77 Pac. 822.

[9] Fox v. Workman, 155 Cal. 201, 100 Pac. 246. This case holds it a condition precedent to the duty to sell, but the other part of the proposition is clearly true.

urer is not liable for a failure to sell unless the demand is specific and definite for the sale of the very property liable. Thus, where a railroad right of way has been included improperly, and the demand is for the sale of the entire property and not merely of the fee, the treasurer is not liable for a refusal to make a sale.[10] If the treasurer refuses to make a sale in a proper case, he may be compelled to do so by mandamus.[11] The effect of the accelerated maturity provision is simply to make the bond due on the making of the demand and delinquent on the day following, leaving its terms otherwise unaffected.[12] The maturing of the bond does not make it cease to bear interest. It continues to bear interest at the rate fixed; and the sale should be made for the entire amount, including all accruing interest.[13]

§ 410. **Same—Effect of Amendment of 1899.**—As we have already seen, section 5 originally provided for a sale in accordance with the provisions relating to sales for delinquent taxes. Later, however, those provisions were amended, the most important change being a new requirement that all sales be made to the state. In passing upon the effect of the amendments, the Supreme Court held that it was not the intent to make the provision for a sale to the state applicable to sales under the Bond Act.[14] Moreover, in certain cases the tax procedure did not exactly fit the case.[15] To make the procedure more definite, the legislature amended section 5 by prescribing the procedure in detail. As we shall see, the new section is an instance of careless legislation; but it is sufficiently definite to establish the necessary procedure.

10 Fox v. Workman, 155 Cal. 201, 100 Pac. 246.
11 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.
12 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.
13 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.
14 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.
15 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

§ 411. **Same—Notice.**—The first step in the proceedings to enforce the lien is the giving of notice of sale. This is governed by subdivision a, which reads as follows: "Upon the application of the holder of any bond that is now or shall hereafter become delinquent as provided in this section, the said city treasurer shall publish for two weeks in a newspaper of general circulation, to be designated by him, published in the city where his office is situated, a notice which must contain the date, number, and series of the delinquent bond, a description of the property mentioned in said bond, and the name of the owner of such property (if known), and if unknown, the fact shall be so stated, the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the cost of publication of such notice are paid, the real property described in said bond will be sold at public auction on a day to be therein fixed, which shall not be less than fifteen nor more than thirty days from the day of the first publication of said notice, and the place of sale, which must be the office of said city treasurer." This is clearly for the benefit of the property owner; and its requirements should be carefully followed. Accordingly, a failure to state the name of the owner is fatal to the notice;[16] as is also a failure to correctly state the place of sale.[17]

§ 412. **Same—Same—Affidavit of.**—Subdivision b reads: "The city treasurer, before the day of sale hereinafter provided for, must file with the city clerk a copy of the publication, with an affidavit of the publisher of such newspaper, or some one in his behalf, attached thereto, that it is a true copy of the same; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication

16 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

17 See Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

was made—which affidavit is primary evidence of all the facts stated therein." Primary evidence is defined by section 1829 of the Code of Civil Procedure as "that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents." Apparently, the effect of the language used is to make the best evidence principle apply to the affidavit. I do not believe, however. that such was the legislative intent. As we have already seen, section 5 originally provided for a sale according to the rules prescribed in cases of general taxation. When the section was amended in 1899 the provisions of the Political Code relating to general taxation were evidently used as a guide. Section 3769 of the Political Code is the provision in the general tax law corresponding to this subdivision, and in it the affidavit is said to be "primary" evidence. In 1872, when that section was adopted, the section of the Code of Civil Procedure quoted defined "original" evidence. Section 1833 of the same code defined "primary" evidence as that "which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." In 1873, section 1829 was amended by changing "original" to "primary," and section 1833 was amended by changing "primary" to "prima facie." Thus, when section 3769 of the Political Code was adopted, it made the affidavit, in effect, prima facie evidence. I believe such was the intent here; although it is questionable whether the court can disregard the definition as it now exists.

§ 413. Same—Right of Owner to Pay Before.—By the terms of subdivision d, "at any time prior to the sale, the owner or person in possession of any real estate offered for sale under the provisions of this act may pay the whole amount of said bond then due, with costs, and said bond

shall thereupon be canceled." The costs include, according to subdivision c, the cost of publication of the notice of sale. This provision also provides for the collection of fifty cents for a certificate of sale, but this apparently applies only in cases of an actual sale. "In case such payment is not made by such owner, or person in possession, or by someone in behalf of such owner, or person in possession, the property subject thereto shall be sold as herein provided." The terms of sale are not prescribed. There is no express provision authorizing the sale of less than the whole parcel subject to the lien. Subdivision j, however, in providing for a notice to cut off the right of redemption, requires it to state "that said property, or a portion thereof, has been sold to satisfy the bond lien." This seems to contemplate that only so much of the property need be sold as will suffice to pay the lien and expenses.

§ 414. **Same—Record.**—Records of the sale must be made by the city treasurer and the county recorder. Subdivision f provides: "The city treasurer, before delivering any certificate, must, in a book kept in his office for that purpose, enter the date, number, and series of the bond, a description of the land sold corresponding with the description of the certificate, the date of sale, purchaser's name, the amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection during office hours when not in actual use, and he shall enter on the record of the bond the words 'Canceled by sale of the property' giving the date of such sale." After making this record, it is clearly his duty to make and deliver a certificate of sale, which should be recorded in the office of the county recorder. Subdivision i provides: "On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the city treasurer, the

fee for which shall be fifty cents." The statute does not state who shall file the certificate.

§ 415. **Same—Certificate.**—There is no express provision requiring the making of a certificate; but such is the manifest intent of the statute. Subdivision i requires the recorder to "make an entry in a book similar to that required of the city treasurer." The recorder is certainly not required to go beyond the certificate for his information. Hence it would seem that the certificate must contain the matters required in the record, viz.: (1) The date, number, and series of the bond; (2) a description of the land sold; (3) the date of sale, purchaser's name, and the amount paid; (4) the number of the certificate, corresponding with the number of the treasurer's record. Proceedings for the sale of property for delinquent assessments are in invitum, and should be closely followed. Hence, it would seem that a failure to insert any of the required matters in the certificate would be fatal to the validity of the proceeding. As a matter of precaution, it is well to state the period of redemption and the time when the purchaser will be entitled to a deed. A failure to state the term of redemption properly was held fatal under the statute as it originally read.[18]

§ 416. **Same—Redemption from.**—Subdivision h provides: "A redemption of the property sold may be made by the owner of the property, or any party in interest, within twelve months from the date of purchase, or at any time prior to the application for a deed, as hereinafter provided. Redemption must be made in lawful money of the United States, and when made to the city treasurer he must credit the amount paid to the person named in his certificate, and pay it on demand to him or his assignees." This allows one year and such additional

[18] Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

time as shall be allowed by reason of failure of the bondholder to comply with subdivision j, within which a redemption may be made. By subdivision g the redemption is made "by the payment to the city treasurer of the purchase money, including costs herein provided for, with interest thereon at the rate of one per cent per month from the date of sale." The costs referred to are the expense of advertising the sale, fifty cents for the certificate, fifty cents for the recorder's fee, and, in some cases, fifty cents for the service and affidavit of service of notice of application for a deed. Although not expressly required, the statute, by implication, requires the treasurer to give a receipt for money paid on redemption. This receipt should be sufficient to identify the certificate of sale from which redemption is made, for by the terms of subdivision i, "on presentation of the receipt of the city treasurer for the total amount of the redemption money, the recorder must, without charge, mark the word 'Redeemed,' the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made." Inasmuch as the recorder must gain this information from the receipt, the receipt should recite all these matters.

§ 417. **Same—Notice of Application for Deed.**—Subdivision j provides: "The purchaser of the property, or his assignee must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a

deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties and costs in this act required. In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; and no deed to the property sold, in accordance with the provisions of this act, shall be issued by the city treasurer to the purchaser of such property, until such purchaser shall have filed with such treasurer an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the said treasurer as other records kept by him in his office." This provision is uncertain in that it does not prescribe how notice shall be served. It is a general principle that when notice is required and no means of service is prescribed, personal service is meant.[19] If such is meant, it is within the power of the owner, by remaining out of the state and leaving the property without an agent, to postpone indefinitely the right of the bondholder to a deed. The meaning of the word "agent" is not altogether clear; although it would seem that it refers to an agent who has charge of the property. The giving of the notice is a condition precedent to the right to a deed.[20] The affidavit should show clearly a notice in accordance with the statute.[21]

§ 418. **Same—The Deed.**—After proof of notice has been filed and the period for redemption has expired, "the

19 Williams v. Bergin, 108 Cal. 166, 41 Pac. 287.

20 Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816. For the same principle as applied to general taxation, see Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

21 See Miller v. Williams, 135 Cal. 183, 67 Pac. 788. For a detailed discussion of the similar provision of the Street Opening Act of 1889, see post.

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[21] See Miller v. Williams, 135 Cal. 183, 67 Pac. 788. For a detailed discussion of the similar provision of the Street Opening Act of 1889, see post.

city treasurer, or his successor in office, upon application of the purchaser or his assignee, must make to said purchaser, or his assignee, a deed to the property, reciting in the deed, substantially, the matter contained in the certificate, and that no person has redeemed the property during the time allowed for its redemption; the treasurer shall be entitled to receive from the purchaser two dollars for making said deed, which shall be deposited in the city treasury for the use of the city after payment has been made therefrom for the acknowledgment of said deed."[22] We have already discussed the contents of the certificate of sale.[23] The effect of the deed is stated in subdivision k: "The deed, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption free of all encumbrances, except the lien for state, county, and municipal taxes." We have already discussed the meaning of the words "primary evidence" as used in subdivision b.[24] The same may be said of them here. Prior to the amendment of 1899, it was held that, to give validity to the deed, it devolved upon the purchaser to prove affirmatively a strict compliance with the statutory provisions.[25] The effect of the present provision is at least to make the deed prima facie evidence of the regularity of the proceedings. This assumes, of course, that the deed is regular on its face. If it does not conform to the statutory requirements, it is invalid on its face and does not authorize a recovery. The lot owner may overcome the effect of the deed by showing that the proceedings are void.[1]

22 Sec. 5, subd. j.

23 See ante, sec. 415.

24 See ante, sec. 412.

25 Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

1 Glassell v. O'Dea, 7 Cal. App. 472, 95 Pac. 44; Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.

§ 419. Right to Enjoin Sale.—Where the assessment and bond are valid, no injunction will issue to restrain a sale because of informalities in the proceedings, unless the owner pays or tenders the amount justly due. This is an application of the maxim, "He who seeks equity must do equity." Thus no injunction will issue to restrain proceedings because of defects in the notice of sale or in the certificate, unless a tender is made.[2] This is necessary, however, only in cases where the assessment and bond are valid. If, for any reason, the assessment is void, no tender is necessary.[3]

DIVISION 2.

PROCEDURE AGAINST STREET RAILROADS.

§ 420. In general.
§ 421. Order to do the work.
§ 422. Time within which work must be done.
§ 423. Service of the order.
§ 424. Effect of default for thirty days.
§ 425. Duty of company to file assumption of work or request for city to do it.
§ 426. Ordinance of intention.
§ 427. Same—Contents.
§ 428. Procedure of Vrooman Act adopted.
§ 429. Issuance of bonds.
§ 430. Lien and enforcement.

§ 420. In General.—Section 6 of the Bond Act provides a procedure for forcing a railroad company to improve the portion of the street it is required by law to keep in order. Section 498 of the Civil Code requires street railway companies "to plank, pave or macadamize the entire length

[2] Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

[3] Chase v. City Treasurer of City of Los Angeles, 122 Cal. 540, 55 Pac. 414. As to the rule in general, see ante, sec. 128.

of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings." And section 7 of the Vrooman Act provides that the property fronting on the improvement shall not be assessed for the cost of work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon. Until 1911 this provision of the Bond Act was the only statutory method provided for enforcing the statutory duty.[1] It is to be noted that the assessment for this work is not predicated upon the theory that the railroad company is benefited. The railroad franchise has attached to it, as one of its conditions, the requirement that the portion used shall be kept in good condition. The procedure here provided is for the enforcement of that positive duty.

§ 421. Order to Do the Work.—The first step in the procedure under section 6 is a resolution ordering the railroad company to do the work. "Whenever any railroad track or tracks of any description exist upon any street or streets on which the city council has ordered work to be done or improvements made, excepting therefrom such portions as is [are] required by law to be kept in order or repair, by any person or company having railroad tracks thereon, the said council may, at any time thereafter, order such person or company to perform upon said excepted portion the work or improvements, similar in all respects to that already ordered to be performed under the same specifications and superintendence, with the same materials, within the same time, and to the like satisfac-

[1] See Schmidt v. Market St. R. R. Co., 90 Cal. 39, 27 Pac. 61, where it was held, prior to the passage of the Bond Act, that no means for enforcing the liability had been created. In general, as to the duty of a street railroad to pave and repair streets, see 104 Am. St. Rep. 648, note; 25 Am. St. Rep. 481, note.

tion and acceptance." This apparently limits the jurisdiction of the council under the procedure here provided. The work can be ordered only after the council has ordered similar work on the street and has excepted the portion required to be kept in order by the railroad company. Giving the words a literal construction, there is no jurisdiction where the balance of the street has been improved by private contract, without public proceedings. The work authorized is to be "similar in all respects to that already ordered." It would seem from this that specifications must be adopted before the order is made, for otherwise the order would not convey to the company the information necessary to compliance. The work is to be done "within the same time" as the other work on the street. Under the Vrooman Act the time is fixed by the street superintendent at or about the time the contract is entered into. Until the time is fixed, the company cannot know what is required. Hence it would seem that the order should not be made until the time has been fixed. It is my contention that the order must be so definite as to notify the railroad company of just what it is required to do.

§ 422. **Time Within Which Work must be Done.**—Section 6 of the Vrooman Act provides that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion." It also provides that the work shall be done under the direction and to the satisfaction of the superintendent of streets. Section 6 of the Bond Act provides that the work shall be done under the same superintendence and within the same time. In my opinion, the effect of these provisions is to require the work to be commenced within the number of days

fixed by the superintendent, to be prosecuted with diligence from day to day, and to be completed within the number of days allowed in the Vrooman Act proceeding for completion. It is only upon this construction that the statute can be made to approach consistency. Moreover, it is reasonable to believe that the legislature did not intend to compel the council to wait until the full time allowed had expired before commencing public proceedings.

§ 423. **Service of the Order.**—"Thereupon it shall be the duty of the clerk of said council to deliver immediately a copy of such order, certified by him, to such person or company, and to make and preserve in his office a certificate of such delivery, its date, and upon whom made" This requires a personal service of the order;[2] and where the railroad is owned by a corporation, the service should be made in the manner provided by law for service upon corporations. Without such service, the council has no jurisdiction to proceed. The statute does not state the effect of the certificate as evidence. The Code of Civil Procedure, however, provides that entries "in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein."[3] Under this, it seems clear that the certificate constitutes prima facie evidence of service. Of course, being only prima facie evidence, it can be contradicted.

§ 424. **Effect of Default for Thirty Days.**—The section then provides: "Should such person or company, for thirty days, or within such extension of time as the city council may grant, thereafter refuse or neglect to make or

[2] It is a general principle that when notice is required and no manner of service is prescribed, personal service is meant: Williams v. Bergin, 108 Cal. 166, 41 Pac. 287.

[3] Code Civ. Proc., sec. 1920.

have made such work or improvement in the manner or time ordered, it shall be the duty of the city council to have such work or improvement performed, and such refusal or neglect punished in the manner provided by law." It is not altogether clear as to what is meant by a neglect or refusal to perform the work for thirty days. It certainly does not mean that the work must be completed within thirty days, for that would be inconsistent with the provision that the same time shall be allowed as has been allowed under the prior proceeding. In my opinion, it means a default for thirty days in doing the work. Thus, it would include a failure to commence work within thirty days of the time fixed, and a failure to prosecute the work with diligence for thirty days after commencement. There is no general provision of law imposing a penalty for failure to perform the work. Section 503 of the Civil Code, however, provides that "cities and towns in or through which street railroads run may make such further regulations for the government of such street railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein." It is possible that under this provision the council might, by ordinance, prescribe penalties for a failure to perform.

§ 425. **Duty of Company to File Assumption of Work or Request for City to Do It.**—"Within fifteen days after receiving the certified copy of said order, such person or company may file with the clerk of said council a written assumption of the performance of said work or improvement, according to the order, or a request to the council to have such work or improvement performed, for and at the expense of such person or company, in the manner herein provided. The failure to file such instrument within said time shall be taken and deemed to be a refusal to comply with the order. Upon receipt of said assumption of

the direct performance of said work or improvement, the city council shall take no further proceedings in the matter, unless such person or company neglects or fails for thirty days, or such further time as the council may grant, to comply with the provisions of the order." Thus, the company may file one of two documents. The only possible effects of filing the request are to relieve from any possible penalties and to have the proceedings for the work started sooner. Unless there is some special provision for a penalty, little is gained by such a request. The effect of filing the assumption of the work is stated in the provision quoted. Just what is meant by the sentence declaring that a failure to file one of such documents shall be deemed to be a refusal to comply with the order is not clear. It may amount to a refusal which will warrant the imposition of a penalty; but it does not, as we shall see, authorize the council to proceed. The words "or fails for thirty days," in the last sentence quoted, evidently mean a default for thirty days in the commencement or prosecution of the work.

§ 426. **Ordinance of Intention.**—"But if such person or company files the said request that the said council have such work or improvement performed, or fails to perform said work within thirty days, or within such further time as the council may grant, then said city council may pass an ordinance of intention to perform said work." Jurisdiction is acquired only in two cases: (1) Where a written request is filed; (2) where the work is not performed within thirty days. It is to be noted that a failure to file a notice of assumption of work is not made sufficient to confer jurisdiction. Where there is not a request on file, there must be an actual neglect or failure to commence work or to prosecute it with diligence. Hence it would seem that a failure to file a notice of assumption is not very material. The company may, it would seem, commence the work

within thirty days; and if it does so and proceeds with it diligently, the council has no jurisdiction.

§ 427. **Same — Contents.** — The ordinance of intention "shall specify the work to be performed, and a statement that unless within thirty days after the recording of the return of the warrant, or within five days after the final decision of the council on an appeal, the said person or company shall pay the cost of said work, or the street superintendent of said city shall issue bonds to represent the cost of said work, stating also that the cost of said work, in case bonds shall issue, shall be paid in ten yearly installments, and also the rate of interest (not to exceed ten per cent per annum) that the same shall bear." In other respects, the ordinance should conform to the requirements of the resolution of intention under the Vrooman Act.[4] The form should be that of an ordinance, however, and not of a resolution. It is well to state the denominations of the bonds.

§ 428. **Procedure of Vrooman Act Adopted.**—The section then provides: "The subsequent procedure shall be as provided by the 'Street Work Act.' A similar statement shall also be incorporated in all notices required to be posted or published by the provisions of the 'Street Work Act'; also in the ordinance or resolution ordering the work, advertisement for proposals, and in the contract." It further provides: "None of the provisions of the 'Street Work Act' in regard to a protest against the work shall apply to any work contemplated by this section. All provisions of the 'Street Work Act' not inconsistent with the provisions hereof shall apply hereto." All the provisions of the Vrooman Act, except those in regard to protests, seem consistent with the procedure here provided, down to the return of the warrant. The assessment and diagram

[4] See ante, sec. 69 ff.

should describe the franchise, tracks, and roadbed along or between which the work has been performed. Inasmuch as the owner must be known, it would seem that the assessment should name the company; and the demand must be made upon the company.

§ 429. **Issuance of Bonds.**—In case of nonpayment, the liability of the company is enforced by the issuance of bonds binding its property. "Whenever the person or company owning any such railroad shall not have, within thirty days after the recording of the return of the warrant, or within five days after the final decision of the council on an appeal, paid the cost of such work, the street superintendent shall issue to the contractor, or his assigns, bonds for the amount of such cost, which shall describe the franchise, tracks, and roadbed along or between which said work has been performed, and describing the same as upon the assessment and diagram, giving its assessment number. Such bonds shall also describe the work performed, giving the total amount of the cost of such work, the name of the owner of said railroad, the number of installments in which the cost of the work is to be paid, and the rate of interest which the deferred payments shall bear. Said bonds shall be in sums of not less than one hundred dollars or more than one thousand dollars, and shall recite that the total amount of the cost of such work, together with the interest thereon, as represented in said bonds, is, except state, county, and municipal taxes, a first lien upon all the track, roadbed, switches, and franchises of said railroad lying within the corporate limits of the city or town, on any part of which said work has been performed. Said street superintendent shall also keep a record of such bonds, as required by section 18 of the 'Street Work Act.'" The form of the bonds is to be substantially that set forth in section 4 of the Bond Act, with the additions above set forth. It will be noted that the bonds

in this case are to be issued by the street superintendent and not by the city treasurer.

§ 430. **Lien and Enforcement.**—"Whenever bonds have been issued, as herein provided, the same, together with the cost of such work and the interest thereon, shall be, except state, county, or municipal taxes, a first lien upon all the tracks, roadbed, switches and franchises of said railroad within the corporate limits of the city or town, on any part of which said work has been performed." It will be noted that the lien is not confined to the property along which the improvement is made. Inasmuch as the charge is not for benefits conferred, but for work done in accordance with a burden imposed as a condition to the franchise, there would seem to be no objection to the extent of the lien. In other words, the principle which denies a personal liability in cases of assessments for benefits does not apply. "Sections 4 and 5 of this act, regarding the form, issuance, and foreclosure of street bonds, and the sale of property described therein, shall apply hereto, except that the work required to be performed by the treasurer by said sections shall be performed by the street superintendent, in so far as the bonds for the paving of railroads are concerned." Hence, upon default in the payment of an installment of principal or interest, the superintendent, upon demand of the bondholder, must sell the property.

CHAPTER III.

IMPROVEMENT ACT OF 1911.

DIVISION 1.

THE GENERAL PROVISIONS.

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§ 431. **In General.**—The Improvement Act of 1911 is an effort to simplify street improvement procedure. It is a combination of the Vrooman Act and the Bond Act, and follows the procedure of these two quite closely. The principal changes are in great measure due to judicial interpretations of the other acts which have resulted in some uncertainty and in occasional injustice. As originally introduced, this act was intended to supersede the other acts named; but it was deemed wise not to make so radical a change until the new act has been interpreted by the courts. Section 83 provides, therefore, that it shall not affect the Vrooman Act or the other street acts, "but is intended to and does provide an alternate system for making the improvements provided for by this act; and it shall be in the discretion of the legislative body of any city to proceed under the provisions either of this act or of such other acts."

§ 432. **Rule of Construction.**—Probably the most comprehensive change attempted in this act is stated in section 82, which reads as follows: "This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of

work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided." Practically the same language is used in the 1911 amendment to section 53 of the Vrooman Act. Inasmuch as the matters which can be settled on appeal are limited, in my opinion this does not change the effect of a failure to comply with the provisions of the act.[1]

§ 433. **Divisions of the Act.**—The act is divided into three main parts. Part I corresponds to Part I of the Vrooman Act; Part II relates to change of grade, and corresponds to Part III of the Vrooman Act; and Part III contains the bond provisions, and is very similar to the Bond Act. These different divisions will be considered separately. The procedure of the first part is in most respects similar to that of the Vrooman Act. In the subsequent paragraphs I shall merely point out the differences between the two acts.

§ 434. **Constitutionality.**—Taken as a whole, the act is clearly constitutional. It adopts two well-defined methods of assessment, viz.: the front-foot plan and the district plan, both of which have been upheld in numerous cases.[2] It provides ample hearing as to the assessment upon particular property, and hence is not open to the objection that persons are deprived of property without due process of law. For the most part, the cases upholding the Vrooman Act are clearly applicable to this act.[3] The title is apparently sufficient. The fact that this act includes the Bond Act does not make it relate to more than one subject.[4] There are a few matters in this act, not affecting

[1] See discussion of similar provision of the Vrooman Act, ante, sec. 58.

[2] See ante, secs. 6–14.

[3] See ante, sec. 56.

[4] See ante, secs. 389–391.

the whole, which may be open to some question. These I shall mention in the detailed discussion of the procedure.

§ 435. Public Street Defined.—The jurisdiction of the council extends only to open public streets, lanes, alleys, etc. Following closely the language of the Vrooman Act, section 1 defines a public street as follows: "All streets, lanes, alleys, places or courts, in the municipalities of this state now open or dedicated, or which may hereafter be open or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purpose of this act, and the city council of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in this act under the proceedings hereinafter described." What has been said in regard to the corresponding section of the Vrooman Act is applicable here, and need not be repeated.[5] Neither this act nor the Vrooman Act prescribes any procedure for the original establishment of a grade. The first section of each, however, confers authority to establish grades in the first instance.

§ 436. Jurisdiction Conferred by the Act.—Section 2 describes the work which the council is authorized to order upon the streets described in section 1. It follows section 2 of the Vrooman Act quite closely; and what has been said as to that act is applicable here.[6] It provides: "Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any portion or portions, either in length or width of any one or more of the streets, avenues, lanes, alleys, courts, places or public ways of any such

[5] See ante, secs. 52–54.
[6] See ante, secs. 50–63.

city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and to order the construction or reconstruction therein of sidewalks, cross-walks, culverts, bridges, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with outlets, cesspools, manholes, catch-basins, flush-tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances; pipes, hydrants and appliances for fire protection; tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water; and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting said streets, avenues, lanes, alleys, courts, places or public ways; the planting of trees thereon, and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits, and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch-basins, flush-tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places, or public ways or property or rights of way of such city."

§ 437. **Resolution of Intention.**—The provision of this act as to the resolution of intention, its contents, and its

publication are in most respects similar to the provisions of the Vrooman Act. Section 3 provides: "Before ordering any work done or improvement made, which is authorized by this act, the city council shall pass a resolution of intention so to do referring to the street by its lawful or official name, or the name by which it is commonly known, and briefly describing the work. Said resolution of intention shall be published twice in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The city council may include in one proceeding, under one resolution of intention and in one contract, any of the different kinds of work mentioned in this act and any number of streets and rights of way or portions thereof, and it may except therefrom any of said work already done upon a street to the official grade. The lots and portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; provided, that this shall not be construed so as to affect the special provisions as to grading contained in subdivision nine of section twenty of this act."

It will be noted that the contents of the resolution under both acts are the same.[7] The provision allowing the designation of the street by the name by which it is commonly known is more liberal, and is designed to overcome the strict rule made applicable to the Vrooman Act.[8] The provision that several streets may be included in one contract is also designed to overcome a ruling under the Vrooman Act, which we have already discussed.[9] The last sentence logically belongs in section 20, and apparently is inserted here out of an abundance of caution. It is to be noted that under this act, it is not necessary to post the resolution of intention.

7 See ante, sec. 69 ff.
8 See ante, sec. 70.
9 See ante, sec. 68.

§ 438. Same—Under the District Plan.—The provision of this act as to the requirements of the resolution of intention for work done under the district plan is identical with the corresponding provision of the Vrooman Act. Section 4 provides: "Whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment-roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof." This has been fully discussed in an earlier chapter.[10]

§ 439. Street Superintendent's Notice.—The provisions as to the street superintendent's notice differ slightly from the corresponding provisions of the Vrooman Act. Section 5 provides: "The street superintendent shall, immediately after the adoption of the resolution of intention cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing or intersection or any part thereof, in front of each quarter block or irregular block liable to be assessed, notices of the passage of said resolution. In case the work

10 See ante, secs. 86-88.

is chargeable upon a district as herein provided, copies of said notice shall also be posted along all the streets within such district at not more than three hundred feet in distance apart but not less than three in all on each street.

"Said notice shall be headed 'Notice of improvement,' in letters of not less than one inch in length; and shall, in legible characters, state the fact of the passage of the resolution of intention, its date, and briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars. Upon the completion of the posting of the notices of improvement the superintendent of streets shall forthwith cause to be filed in the office of the city clerk an affidavit stating the fact of the completion of the posting of such notices and the date of such completion and thereafter all persons shall be deemed to have notice of the date of the completion of such posting."

Several matters must be noted. (1) Under this act the notice need not be published. (2) It is to be posted immediately after the passage of the resolution of intention. Under the Vrooman Act, it must not be posted until after the expiration of the period of the posting and publication of the resolution of intention. (3) It is to be posted, not only along the line of the improvement, but along the street frontages of all streets within the district. (4) Under this act, the notices may be three hundred instead of one hundred feet apart. (5) An affidavit of posting is expressly required. Hence it would seem that a failure to file it forthwith might affect the jurisdiction. In this respect, this act is more stringent than the Vrooman Act.

The contents of the notice are the same as under the Vrooman Act. Hence what has been said in regard to the contents of the notice under that act is applicable here.[11]

[11] See ante, sec. 94.

It would also seem clear that the rule as to the measuring of the distance between the notices is applicable.[12]

§ 440. **General Principles as to Publication and Posting.** Section 81 provides: "Whenever any resolution, order, notice, or determination is required to be published or posted, and the duty of posting or procuring the publication or posting of the same is not specifically enjoined upon any officer of the city it shall be the duty of the city clerk to post or procure the publication or posting thereof, as the case may be. No proceeding or step herein shall be invalidated or affected by any error or mistake or departure herefrom as to the officer or person posting, or procuring the publication or posting, of any resolution, notice, order or determination hereunder when the same is actually published or posted for the time herein required."

§ 441. **Protests.**—The provisions as to protests differ widely from the corresponding provisions of the Vrooman Act. Section 6 provides: "At any time within fifteen days after the date of the second publication of the resolution of intention or if the posting of the notice of improvement has been completed after the second publication of the resolution of intention then within fifteen days after the date of the completion of the posting of the said notice of improvement any owner of property liable to be assessed for said work may make written protest against the proposed work or against the extent of the district to be assessed, or both. Such protest must be in writing and be delivered to the said clerk of the city council, who shall indorse thereon the date of its receipt by him. At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and con-

12 See ante, sec. 95.

clusive; provided, however, that when the protest is against the proposed work, and the cost thereof is to be assessed upon the property fronting thereon and the city council finds that such protest is made by the owners of a majority of the property fronting on the proposed work, or when the protest is against the proposed work and the cost thereof is to be assessed upon the property within a district and the city council finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for said improvements, no further proceedings shall be taken for a period of six months from the date when said protest was received by the said clerk of said city council, unless the said protest be overruled by an affirmative vote of four-fifths of the members of the city council. The city council may adjourn said hearing from time to time."

In general, what has been said in the discussion of the Vrooman Act as to the form, contents, execution, and construction of protests, and the necessity for filing within the time allowed, applies here.[18] The following differences should be carefully noted: (1) This act provides for but two classes of protest—a protest against the improvement and a protest against the extent of the district. In both cases hearings must be had before jurisdiction can be acquired, whether the protests are signed by a majority or not. No notice of hearing is necessary. (2) The time within which the protests must be filed is much shorter than the time allowed by the Vrooman Act. (3) When the work is done under the district plan, owners within the district are entitled to the benefits of a majority protest. (4) In no case is a protest a bar if the council, by a four-fifths vote, declares it shall not be.

The provision that the decision of the council shall be final and conclusive means, of course, that it shall have

[18] See ante, secs. 99–103.

that effect as to matters within the jurisdiction of the council to determine.[14] The effect of sustaining a protest to the improvement would seem to be to terminate the proceedings. New proceedings should be commenced in case the council decides to go on with the improvement after the expiration of the period of six months.[15] It is to be noted that this provision does not authorize the council to change or alter the district without commencing anew.

§ 442. **Right to Adjourn Hearing.**—Section 80 provides: "Whenever in proceedings hereunder, a time and place for hearing by the city council is fixed, and from any cause, the hearing is not then and there held or regularly adjourned to a time and place fixed, the power of the city council in the premises shall not thereby be devested or lost but the city council may proceed anew to fix a time and place for the hearing and cause notice thereof to be given by publication by at least one insertion in a daily, semi-weekly or weekly newspaper, such publication to be at least five days before the date of the hearing, and thereupon the city council shall have power to act as in the first instance."

§ 443. **When Jurisdiction Acquired.**—Section 7 provides: "When no protests have been delivered to the clerk of the city council within fifteen days after the date of the second publication of the resolution of intention or if the posting of the notice of improvement has been completed after the second publication of the resolution of intention then within fifteen days after the date of the completion of the posting of the said notice of improvement, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, or when a pro-

[14] See ante, secs. 114, 263.

[15] See ante, sec. 105 ff.

test against the extent of the proposed district shall have been heard and denied, immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements." In other words, after the time for protest has expired, and all protests filed have been heard and acted upon, the council may order the work.

§ 444. **Plans and Specifications.**—The provisions of this act as to plans and specifications are identical with those of the Vrooman Act. Hence, what has been said as to plans and specifications in an earlier chapter is applicable here.[16] Section 8 provides: "Before passing any resolution for the construction of improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him."

§ 445. **Descriptions by Reference.**—Section 9 is intended to simplify the statements in the later proceedings; but its wording is such as to make it open to some question. It reads: "In all resolutions, notices, orders and determinations subsequent to resolution of intention and notice of improvement, it shall be sufficient to briefly describe the work or the assessment district or both and to refer to the resolution of intention for further particulars." It will be remembered that section 5 only requires a brief description of the work, and a reference to the resolution for further particulars, to be inserted in the notice of improvement. A similar provision of the Vrooman Act has been interpreted by the courts.[17] Does the reference in this section to the notice of improvement mean that in the

[16] See ante, secs. 120–128.

[17] See ante, sec. 94.

later proceedings a still briefer statement is allowable? It certainly will be the safer practice to insert as full a description of the work in all the proceedings as is contained in the notice of improvement.

§ 446. The Award of the Contract.—In most respects, the procedure for the award of the contract is the same as prescribed by the Vrooman Act.[18] Section 10 provides:

"Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall pass a resolution ordering the work. Notice, with specifications, shall be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered. Notice inviting such proposals, and referring to the specifications posted or on file, shall be published twice in a daily, semi-weekly, or weekly newspaper published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. The time fixed for the opening of bids shall be not less than ten days from the time of the first publication or posting of said notice. All proposals or bids offered shall be accompanied by a check payable to the city certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall, in open session publicly open, examine and declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satis-

[18] As to the procedure under the Vrooman Act, see ante, secs. 134–183.

factory to the council. The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid.

"If the bids are rejected or no bids are received the city council may within six months thereafter re-advertise for proposals or bids for the performance of the work as in the first instance, without further proceedings, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bid so rejected. But the checks accompanying such accepted proposals or bids shall be held by the city clerk of said city until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage. whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city and shall be collected by it and paid into its general fund, and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund."

A few differences are to be noted. (1) This act does not expressly state that the council shall "cause" notice to be given. It is clear, however, that the council should direct the notice; and it is expressly stated that it shall designate the newspaper. (2) The time for opening of bids must be stated in the notices. This implies that it

must be fixed by the council. (3) The fact that a time must be fixed necessarily requires that if an award is not made upon bids received, no other award can be made without re-advertising. (4) No approval of the award is required.

§ 447. **Notice of Award.**—The provision for a notice of award is practically identical with the corresponding provision of the Vrooman Act.[19] It even copies the error contained in the other act as to "posting of proposals." Section 11 provides: "Notice of such award of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work, and shall be published twice in a daily newspaper published and circulated in said city and designated by said city council, or in cities where there is no daily newspaper by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such city, then such notice of award shall only be kept posted as hereinbefore provided."

§ 448. **Property Owners' Contract.**—The provisions for a property owners' contract are similar to the corresponding provisions of the Vrooman Act.[20] Section 12 provides: "The owners of three-fourths of the frontage of lots and lands liable to be assessed, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded, and all work done under such con-

[19] As to the notice of award under the Vrooman Act, see ante, sec. 144.

[20] See ante, secs. 147, 148.

tract shall be subject to such regulations as may be prescribed by ordinance of the city council. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first publication of said award, and to prosecute the same with diligence to completion, it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid.

"All contracts entered into between the owners of any property and the contractor or his agents shall be in duplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the contractor or his agent, and the duplicate shall be held by the owners, who must receipt to the agent or contractor therefor."

§ 449. **Re-advertising for Bids.**—Section 13 provides: "But if such original bidder neglects, fails or refuses, for fifteen days after the first publication of the notice of award, to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids, as in the first instance, and award the contract for said work to the then lowest regular bidder. Should no bids be received in response to this second call for proposals, the council may again advertise for bids under the same proceedings, at any time within six months from the time set for the last reception of bids, and let the contract to the then lowest bidder, and such delay shall in no way affect the validity of any of the proceedings or assessments levied thereunder. The bids of all persons and the election of all owners, as aforesaid, who have failed to enter into the contract, as herein provided, shall be re-

jected in any bidding or election subsequent to the first for the same work."

This is in most respects the same as the provision of the Vrooman Act, which we have already discussed.[21] The provision for a third advertisement, however, is an addition. As we have already seen, the fact that a date must be fixed for the receipt of bids makes an advertisement essential before a contract can be legally awarded.

§ 450. **Reletting Portion of Work on Default.**—Section 14 provides: "If the owner or contractor, who may have taken any contract, does not complete the same within the time limited in the contract, or within such further time as the city council may give him, the superintendent of streets shall report such delinquency to the city council which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance." This is identical with the provision of the Vrooman Act, which has already been discussed.[22]

§ 451. **Bond of Contractor for Faithful Performance.**—This act, following the Vrooman Act, requires two bonds of the contractor. The first is to secure the performance of the work. Section 15 provides: "All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets of said city, with two or more sureties and payable to such city, in a sum not less than twenty-five per cent of the amount of the contract, conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above

21 See ante, sec. 143.
22 See ante, sec. 174.

all statutory exemptions." This is the same as the provision of the Vrooman Act, except for the provision fixing the amount of the bond.[28]

§ 452. **Bond for Labor and Material.**—Section 19 provides: "Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies or corporations who perform labor on, or furnish materials to be used in the said work or improvement, and shall provide that if the contractor, person, company or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work or improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company or corporation, filing the same, or their as-

[28] See ante, sec. 151.

signs, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof." This is identical with section 6½ of the Vrooman Act, which has already been discussed.[24] The validity of the provision for an attorney's fee is at least doubtful.

§ 453. **Notice of Erroneous Proceeding.**—Section 16 provides: "At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, provided the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act."

Except for a slight change in the last sentence, this is the same as section 5½ of the Vrooman Act, which has already been discussed.[25] The principal change is the omission of the words, "excepting as to matters directly affecting the jurisdiction of the council to order the said work or improvement." It is the evident purpose of the change to require notice of all defects, jurisdictional and otherwise, with the two exceptions named.

[24] See ante, sec. 152.
[25] See ante, sec. 145.

§ 454. Deposit of Incidental Expenses.—Section 17 provides: "Before being entitled to a contract, the bidder to whom the award was made or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of publication of the notices, resolutions, orders and matters required under the proceedings prescribed in this act, and of such other notices as may be deemed requisite by the city council, together with all other incidental expenses. And in case the work is abandoned by the city before the letting of the contract the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury." This is the same as the provision of the Vrooman Act, which has already been discussed.[1]

§ 455. The Contract.—The provision for the execution of the contract is identical with section 6 of the Vrooman Act.[2] Section 18 provides: "The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and to receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act; and he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the city council. The work must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, and all contracts made therefor must contain a provision to that

1 See ante, sec. 155.
2 See ante, secs. 156–173.

effect, and also express notice that, in no case, except where it is otherwise provided by law or the city charter will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made. The assessment and apportionment of the expenses of all such work or improvement shall be made by the superintendent of streets in the mode provided by this act."

§ 456. **Methods of Assessment.**—The methods of making the assessment are prescribed by section 20. They are practically the same as those prescribed by the Vrooman Act, which we have already discussed in detail.[3] Section 20 provides:

"*Frontage assessment.*

"Subdivision One.—The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

"*Main street crossings.*

"Subdivision Two.—The expense of the work done on main street crossings shall be assessed at a uniform rate per front

[3] See ante, secs. 184–202.

foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, or to the end of such street if it does not meet another, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

"*Main street terminations.*

"Subdivision Three.—Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main streets, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

"*Alley and main street crossings.*

"Subdivision Four.—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another.

"*Alley crossings.*

"Subdivision Five.—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

"Subdivision Six.—Where a subdivision street, avenue, lane, alley, place or court terminates in another street, avenue, lane, alley, place or court, the expense of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, avenue, lane, alley, place or court so terminating, according to its frontage thereon, halfway, on each side, respectively, to the next street, avenue, lane, alley, place or court, or to the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

"*One side of street.*

"Subdivision Seven.—Where any work mentioned in this act (manholes, sewers, cesspools, culverts, cross-walks, piling and capping excepted) is done on one side of the center line of any street, or sewering or resewering is ordered to be done under the sidewalk on only one side of any street for any length thereof, the assessment for the expenses thereof shall be made only upon the lots and lands fronting nearest upon that side of the street and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

"*Public property.*

"Subdivision Eight.—Whenever any lot, piece or parcel of land belonging to the United States, or to the State of California, or any lot, piece or parcel of land belonging to any county, city, public agent, mandatory of the government, school board, educational, penal or reform institution, or institution for the feeble-minded or the insane, and being in use in the performance of any public function, shall front upon the proposed work or improvement, or be included within the district declared by the city council in its resolution of intention to be the district to

be assessed to pay the costs and expenses thereof, said city council may, in the resolution of intention, declare that said lots, pieces or parcels of land, or any of them, shall be omitted from the assessment thereafter to be made to cover the costs and expenses of said work or improvement. In the event that said lots, pieces or parcels of land, or any of them, shall by said resolution be omitted from the assessment, then the total expense of all work done shall be assessed on the remaining lots fronting on the work or improvement, or lying within the limits of the assessment district, without regard to such omitted lots, pieces or parcels of land. In the event that the council shall, in such resolution of intention, declare that said lots, pieces or parcels of land so owned as aforesaid, or any of them, shall be included in the assessment, or in the event that no declaration is made respecting such lots, pieces or parcels of land, or any of them, then said city shall be liable for such sum or sums as may thereafter be assessed against any such lots, pieces or parcels of land so owned and used, and so included in the assessment by reason of the aforesaid declaration, or such lots, pieces or parcels of land so owned and used respecting which the resolution of intention makes no declaration, which shall be payable by the said city out of the general fund unless the legislative body shall in its resolution of intention designate another fund.

"When owners may grade.

"Subdivision Nine.—It shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform, at his or their own expense (after obtaining permission from the council so to do, but before said council has passed its resolution of intention to order grading inclusive of this), any grading upon said street, to its full width, or to the center line thereof, and to its

grade as then established, and thereupon to procure, at his or their own expense, a certificate from the city engineer, setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter to file said certificate with the superintendent of streets, which certificate the superintendent shall record in a book kept for that purpose in his office, properly indexed. Whenever thereafter the city council orders the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contracts must express the price by the cubic yard for cutting and filling in grading; and the said owner or owners and his or their successors in interest, shall be entitled to credit, on the assessment upon his or their lots and lands fronting on said streets for the grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been duly altered, only for so much of said certified work as would be required for grading to the altered grade; provided, however, that such owner or owners shall not be entitled to such credit as may be in excess of the assessments for grading upon the lots and lands owned by him or them, and proportionately assessed for the whole of said grading; and the superintendent of streets shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the duly altered grade so much of said certified work as would be required for grading thereto, and shall enter corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands

owned, respectively, by said certified owners and their successors in interest; provided, however, that he shall not so include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners or their successors in interest. Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, (except grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done; provided, that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time said order is passed.

"*Diagram of assessment district.*

"Subdivision Ten.—Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city engineer shall make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the city council, the clerk shall certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the superintendent of streets of said city,

who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets or city council, on appeal, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section, and the provisions of subdivisions one, two, three, four, five, six and seven of this section shall not be applicable to the work or improvement provided for in this subdivision.

"*Railroad property.*

"Subdivision Eleven.—The terms, lot, lots, lands, piece or parcel of land wherever mentioned in this act shall be deemed to include and shall include property owned or controlled by any person, firm or corporation as a railroad, street or interurban railroad right of way, and whenever a railroad, street or interurban railroad right of way, shall front on or about or parallel or be included within or divide longitudinally any street improved under the provisions of this act or shall be included within any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the manner and with the same effect as other lots, lands or pieces

or parcels of land are assessed as provided in this act, and such railroad, street or interurban railroad right of way shall be subject to sale for nonpayment of assessments as in this act provided."

§ 457. **The Assessment—In General.**—The preliminary steps for the assessment are the same as under the Vrooman Act.[4] Section 21, which is practically the same as section 8 of the Vrooman Act, reads as follows: "After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (including any incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done; or, if any direction and decision be given by said council on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot, or portions of a lot (if known to the street superintendent); if unknown the word 'Unknown' shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram exhibiting each street or street crossing, lane, alley, place or court, on which any work has been done, and showing the relative location of each district, lot, or portion of lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet

[4] See ante, secs. 203–214.

fronting, or number of lots assessed, for said work contracted for and performed."

§ 458. **Warrant.**—The provision for the warrant is the same as under the Vrooman Act.[5] Section 22 provides:

"To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

"FORM OF WARRANT.

"By virtue hereof, I (name of the superintendent of streets), of the city of ....., county of ..... (or city and county of .....), and State of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower (name of contractor) (his or their) agents or assigns, to demand and receive, the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same.

"(Date) .....

"..... (name of superintendent of streets).

"Countersigned by (name of mayor)."

§ 459. **Record of the Assessment.**—The provisions for record are, in the main, similar to those of the Vrooman Act.[6] Section 23 provides: "Said warrant, and assessment, together with the certificate if any of the city engineer of the quantity and character of the work done, shall be recorded in the office of said superintendent of streets, the diagram shall there be filed. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner

[5] See ante, secs. 215–219.

[6] See ante, secs. 220–231.

discharged; and from and after the date of said recording of any warrant, assessment and certificate, all persons shall be deemed to have notice of the contents of the record thereof. After said warrant, assessment, and certificate are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agent or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments."[6]

The following differences should be noted: (1) This act does not require that the diagram be recorded. It is sufficient to file it. (2) The certificate of the engineer is defined. From the wording, it would seem that the procuring of such a certificate is not essential, and that a record is necessary only where a certificate is actually issued. (3) Under this act, the record is made notice to all persons.

§ 460. **Demand.**—The provision for a demand is identical with the provision of the Vrooman Act.[7] Section 24 provides: "The contractor or his assigns, or some person in his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made the contractor, his assigns, or some person in his or their behalf, shall receipt the same upon the assessment in presence of the person making such payment, and shall also give a separate receipt if demanded. Whenever the person so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as 'Unknown' on the assessment, then the said contractor, or his assigns, or some person in his or

[7] See ante, secs. 232–238.

their behalf, shall publicly demand payment on the premises assessed."

§ 461. **Return of the Warrant.**—The provision for the return of the warrant is identical with the provision of the Vrooman Act.[8] Section 25 provides: "The warrant shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon, signed by the contractor, or his assigns, or some person in his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid, in whole or in part, and the amount thereof. Thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full length in a book to be kept for that purpose in his office, and shall sign the record. The said superintendent of streets is authorized at any time to receive the amount due upon any assessment list and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued; and if any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed; provided however, that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with

[8] See ante, secs. 239–241.

the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid, said interest to be computed from the date of the recording of the return."

§ 462. Appeal to the Council.—In most respects the provisions for an appeal to the council follow section 11 of the Vrooman Act.[9] Section 26 provides: "The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council. Notice of the time and place of the hearing, as fixed by the council, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be posted conspicuously by the clerk, on or near the chamber door of the council chambers, for five days. Upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require

[9] See ante, secs. 251–265.

the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option. All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied, during the progress of the proceedings, or which it can at that time remedy. No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section four of this act, before the passage of the resolution ordering the work to be done."

The following differences should be noted: (1) This provision expressly requires the council to fix the time of hearing. (2) Notice is to be posted instead of published. (3) The last sentence is fuller, but, in my opinion, is of no more effect than the provision of the Vrooman Act. Under the Vrooman Act, the language has been given practically no effect.[10]

§ 463. **Suit to Foreclose Lien.**—The provision for foreclosure of the lien is in most respects the same as the provision of section 12 of the Vrooman Act.[11] Section 27 provides:

10 See ante, sec. 263.
11 See ante, secs. 266–316.

"At any time after the period of thirty-five days from the day of the date of the warrants, as herein provided, or if an appeal is taken to the city council, as provided in section twenty-six of this act, at any time after five days from the decision of said council, or after the return of the warrant or assessment, after the same may have been corrected, altered, or modified, as provided in said section twenty-six (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent but not otherwise the plaintiff shall recover such sum as the court may fix, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover the sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor. Suit may be brought in the superior court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners thereof cannot, with due diligence, be found, the service of each of said actions may be had in such manner as is prescribed in the codes and laws of this state. It shall be competent to bring a single action under any such assessment irrespective of the number of lots assessed where

the parties defendant are identical and where separate actions are brought the same may be consolidated by order of the court. The said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action."

The following differences should be noted: (1) In a contested case, the court may allow a reasonable attorney's fee, instead of a mere fifteen dollars. We have discussed the validity of this provision in an earlier chapter.[12] (2) The provision for consolidation of actions is new. Under the Vrooman Act, however, several actions against one owner may be joined.

§ **464. Reassessment.**—The provision for a reassessment is more liberal than the corresponding provision of the Vrooman Act.[13] Section 28 provides:

"Whenever, in any suit, the lien of an assessment or reassessment, or of a bond issued for the cost of such work, shall be held invalid for any cause arising subsequent to the publication and posting of the resolution of intention and the posting of the notices of improvement along the line of work, or because the work or any part thereof is not sufficiently described in the resolution of intention, the contractor or his assigns, or the holder of such bond shall have the right, within sixty days thereafter, to apply for and receive a new assessment for the cost of the work done and sufficiently described in the resolution of intention, or specifications on file, such cost to be assessed upon the property and in the same manner as provided in section twenty

12 See ante, sec. 308.

13 See ante, secs. 246–249.

and twenty-one of this act; and the street superintendent shall, within twenty days after such application, make and deliver to said applicant a new assessment, warrant and diagram in accordance with the law governing the issuance of originals of such documents, and the mayor shall in like manner countersign the said warrant, which reassessment shall be a lien on the property so assessed for two years from the date of the recording of said reassessment and warrant and be enforced in the same manner as an original assessment would be enforced. If an appeal be taken from the judgment in which such an assessment is held invalid, the time herein provided for making application for a new assessment shall not begin until such case be in some manner finally disposed of."

It will be noted that this does not require a final judgment as a prerequisite to a reassessment. Of course, a reassessment will be made only where the error is such that it can be corrected on a reassessment. The provision for such relief when the defect is in the description of the work as set forth in the resolution of intention clearly applies only to cases where the description is good in part. In such a case, a new assessment for the valid part of the work may be made.

§ 465. **Sale on Execution.**—The provisions for sale on execution are identical with the provisions of the Vrooman Act.[14] Section 29 provides: "The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts; and on appeal, the appellate courts shall be vested with the same power to adjudge and decree a lien and to order such premises to be sold on execution or decree as is conferred on the court from which an appeal is taken. Such

[14] See ante, secs. 313–315.

premises, if sold, may be redeemed as in other cases. In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the codes of this state."

§ 466. **Partial Assessment.**—The provision for a partial assessment is practically the same as the provision of the Vrooman Act.[15] Section 30 provides: "The city council, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as provided in the preceding sections."

§ 467. **Repairs—In General.**—Section 36 is practically identical with section 13 of the Vrooman Act.[16] It provides:

"When any portion of any improved street, avenue, lane, alley, court, or place in said city, or any sidewalk constructed thereon shall be out of repair, or needing reconstruction, and in condition to endanger persons or property passing thereon, or in condition to interfere with the public convenience in the use thereof, it shall be the duty of said superintendent of streets to require, by notice in writing, to be delivered to them or to their agents personally, or left on the premises, the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court, or place, or said portion of said sidewalks so out of repair or needing reconstruction as aforesaid, to repair or reconstruct, or to do both, forthwith, said portion of

[15] See ante, sec. 205.
[16] See ante, sec. 317 ff.

said street, avenue, lane, alley, court, or place, to the center line of said street in front of the property of which he is the owner, or tenant, or occupant; and said superintendent of streets shall particularly specify in said notice what work is required to be done, and how the same is to be done, and what material shall be used in said repairs, or reconstructions, or both. If said repairs, or reconstructions, or both, be not commenced within three days after notice given as aforesaid, and diligently and without interruption prosecuted to completion, the said superintendent of streets may, under authority from said city council, make such repairs, reconstructions, or both, or enter into a contract with any suitable person, at the expense of the owner, tenant, or occupant, after the specification for the doing of said work shall have been conspicuously posted by him in his office for two days, inviting bids for the doing of said work, which bids shall be delivered to him at his office on or before the second day of said posting, and opened by him on the next day following the expiration of said two days of posting, and the contract by him be awarded to the lowest bidder, if such lowest bid, in the judgment of said street superintendent, shall be reasonable. All of said bids shall be preserved in his office and open at all times after the letting of the contract to the inspection of all persons, and such owner, tenant, or occupant shall be liable to pay said contract price. Such work shall be commenced within twenty-four hours after the contract shall have been signed, and completed without delay to the satisfaction of said street superintendent. Upon the completion of said repairs, or reconstruction, or both, by said contractors as aforesaid, to the satisfaction of said superintendent of streets, said superintendent of streets shall make and deliver to said contractor a certificate to the effect that said repairs, or reconstruction, or both, have been properly made by said contractor to the grade, and that the charges for

the same are reasonable and just, and that he, said superintendent, has accepted the same."

§ 468. **Same—Right to Sue.**—Section 32 is practically identical with section 14 of the Vrooman Act.[17] It provides: "If the expenses of the work and material for such improvement, after the completion thereof, and the delivery to said contractor of said certificate, be not paid to the contractor so employed, or his agent or assignee, on demand, the said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant, for the amount contracted to be paid; and said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the said superintendent of streets in a book kept by him in his office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien, the same as provided in section twenty-three of this act, and may be enforced in the same manner."

§ 469. **Same—Additional Penalty.**—Section 33 is practically identical with section 15 of the Vrooman Act.[18] It provides: "In addition, and as cumulative to the remedies above given, the city council shall have power, by resolution or ordinance, to prescribe the penalties that shall be incurred by any owner or person liable, or neglecting, or refusing to make repairs when required, as provided in section thirty-one of this act, which fines and penalties shall be recovered for the use of the city by prosecution in the name of the people of the state of California in the court having jurisdiction thereof, and may be applied, if deemed expedient by the said council, in the payment of the expenses of any such repairs not otherwise provided for."

17 See ante, sec. 325.
18 See ante, sec. 326.

§ 470. **Right of Tenant to Pay Assessment.**—Section 34 is the same as section 17 of the Vrooman Act.[19] It provides: "Any tenant or lessee of the lands or lots liable may pay the amount assessed against the property of which he is the tenant or lessee under the provisions of this act, or he may pay the price agreed on to be paid under the provisions of section thirty of this act, either before or after suit brought, together with costs, to the contractor, or his assigns, or he may redeem the property, if sold on execution or decree for the benefit of the owner, within the time prescribed by law, and deduct the amount so paid from the rents due and to become due from him, and for any sums so paid beyond the rents due from him, he shall have a lien upon and may retain possession of the said land and lots until the amount so paid and advanced be satisfied, with legal interest, from accruing rents, or by payment by the owner."

§ 471. **Service of Notices.**—Section 35 is the same as section 19 of the Vrooman Act. It provides: "Notices in writing which are required to be given by the superintendent of streets, under the provisions of this act, may be served by any person, with the permission of the superintendent of streets, and the fact of such service shall be verified by the oath of the person making it, taken before the superintendent of streets, who for that purpose, and for all other purposes, and in all cases where a verification is required under the provisions of this act, is hereby authorized to administer oaths, or other person authorized to administer oaths or such notices may be delivered by the superintendent of streets himself, who must also verify the service thereof, and who shall keep a record, of the fact of giving such notices, when delivered by himself personally, and also of the notices and proof of service when delivered by any other person."

[19] See ante, sec. 245.

§ 472. **Acceptance of Streets.**—The provision for acceptance of streets is similar to the former provision of section 20 of the Vrooman Act.[20] Section 36 provides:

"Whenever any street, or portion of a street, has been or shall hereafter be fully constructed and substantially paved in accordance with specifications adopted by the council, and to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, and a sewer, gas-pipes, and water-pipes are laid therein, under such regulations as the city council shall adopt, the same may be accepted by the city council, by ordinance, for all time or for a term of years, as the council may determine, and thereafter the same shall be kept in repair and improved by the said municipality, for the period of such acceptance; the expense thereof, together with the assessment for street work done in front of city property, to be paid out of a fund to be provided by said council for that purpose; provided, that the city council shall not accept any portion of the street less than the entire width of the roadway (including the curbing), and one block in length, or one entire crossing; and, provided further, that the city council may partially or conditionally accept any street, or portion of a street, without a sewer, or gas-pipes, or water-pipes therein, if the ordinance of acceptance expressly states that the council deems such sewer, or gas-pipes, or water-pipes, to be then unnecessary, but the lots of land previously, or at any time, assessable for the cost of constructing a sewer shall remain and be assessable for such cost, and for the cost of repairs and restoration of the street damaged in the said construction, whenever said council shall deem a sewer to be necessary, and shall order it to be constructed, the same as if no partial or conditional acceptance had ever been made. The superintendent of streets shall keep in his office a register of all streets ac-

[20] See ante, secs. 328–332.

cepted by the city council under this section, which register shall be indexed for easy reference thereto."

Two differences must be noted: (1) Under this act, the street must be "substantially paved in accordance with specifications adopted by the council." (2) The council is authorized to accept a street for a term of years.

§ 473. **Records of Street Superintendent.**—Section 37 is a combination of portions of sections 18 and 21 of the Vrooman Act. It provides: "The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any citizen wishing to examine them, free of charge."

§ 474. **Duties of Street Superintendent.**—Section 38 is a combination of portions of sections 21 and 22 of the Vrooman Act. It provides: "It shall be the duty of the superintendent of streets to see that the laws, ordinances, orders, and regulations relating to the public streets and highways be fully carried into execution, and that the penalties thereof are rigidly enforced. He shall keep himself informed of the condition of all the public streets and highways, and also of all public buildings, parks, lots, and grounds of said city, as may be prescribed by the city council. He shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties and for such sums as may be required by the city council; and should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a viola-

tion thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect. He shall superintend and direct the cleaning of all sewers, and the expense of the same shall be paid out of the street or sewer fund of said city."

§ 475. Liability for Defective Streets.—Section 39 is practically the same as section 23 of the Vrooman Act.[21] It provides: "If, in consequence of any graded street or public highway or sidewalk, being out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using said street or public highway, or sidewalk and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after written notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city." It is to be noted that this extends the liability to include defective sidewalks.

§ 476. Partial Expenses from Treasury.—Section 40 is similar to section 26 of the Vrooman Act.[22] It provides: "The city council may, in its discretion, order, by resolu-

21 See ante. secs. 334–339.

22 See ante, sec. 333.

tion that the whole or any part of the cost and expenses of any of the work mentioned in this act be paid out of the treasury of the municipality from such fund as the council may designate, in which case it shall be so stated in the resolution of intention. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, in making up the assessment heretofore provided for such cost and expenses, shall first deduct from the whole cost and expenses such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said costs and expenses proportionately upon the lots, parts of lots and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided." The only addition is the express requirement that the fact that part of the expense is to be paid out of the public treasury must be stated in the resolution of intention.

§ 477. **Duties of Engineer.**—Section 41 is practically identical with subdivision 1 of section 34 of the Vrooman Act. It provides: "The city engineer, or where there is no city engineer, the county or city and county surveyor, shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed.

Said city council is hereby empowered to fix his compensation for such services."

§ 478. **Inspection.**—Section 42 is practically the same as section 35 of the Vrooman Act. It provides: "The superintendent of streets shall, when in his judgment it is necessary, appoint a suitable person to take charge of and superintend the construction and improvement of each and every sewer constructed or improved under the provisions of this act, and of piling and capping sidewalks, or of the paving of whatever character heretofore mentioned, in whole or in part, of one block or more, whose duty it shall be to see that the contract made for the doing of said work is strictly fulfilled in every respect, and in case of any departure therefrom to report the same to the superintendent of streets. Such person shall be allowed for his time actually employed in the discharge of his duties such compensation as shall be just, but not to exceed five dollars per day. The sum of which the party so employed shall be entitled shall be deemed to be incidental expenses, within the meaning of those words as defined by this act."

DIVISION 2.

CHANGE OF GRADE.

§ 479. In general.
§ 480. Resolution of intention.
§ 481. Claims for damages.
§ 482. Commissioners.
§ 483. Damages and benefits.
§ 484. Report of commissioners.
§ 485. Notice of hearing report.
§ 486. Objections to report.
§ 487. The contract.
§ 488. The assessment.
§ 489. Assessment-roll.
§ 490. Collection of assessments.
§ 491. Sale for delinquency.
§ 492. Redemption.
§ 493. Payment of funds to treasurer.
§ 494. Notice of payment of damages.
§ 495. Eminent domain proceedings.

§ 479. In General.—Part II of the Improvement Act of 1911 deals with the procedure for change of grade. It relates to the change of an established grade, and not to the original establishment.[1] In the main, it follows closely the procedure prescribed by the Vrooman Act. I shall, therefore, merely state the provisions and point out the variations from the Vrooman Act.

§ 480. Resolution of Intention.—Section 43 corresponds to section 38 of the Vrooman Act.[2] It provides: "The city council is hereby empowered to change or modify the grade of any public street, lane, alley, place or court, and to regrade or repave the same, so as to conform to such modified grade, in the manner as hereinafter provided. Before any change of grade is ordered the city council shall pass a resolution of intention to make such change or

[1] See ante, sec. 363.
[2] See ante, sec. 365.

modification of grade, and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, or curbing of said street or portion of street, with the same or other material with which it was formerly graded, paved, sewered, sidewalked, or curbed; and that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such changed or modified grade. One or more streets or blocks of streets may be embraced in the same resolution. Such resolution shall be published twice in the newspaper in which the official notices of the city council are usually printed and published, to be designated in such resolution and shall describe the proposed change or modification of grade or regrading, and shall designate and establish the district to be benefited by such change or modification of grade or regrading, and to be assessed for the cost of the same. The superintendent of streets shall also cause to be conspicuously posted within the district designated in the resolution, notice of the passage of said resolution. Said notice shall be the same in all requirements of contents and posting as the 'notices of improvement' provided for in section four of this act. If no objection to said proposed change or changes, or modifications of grade, shall be filed with the clerk of the council within thirty days from the first publication of the resolution of intention hereinbefore mentioned, or, if objections are presented and after due notice and hearing are overruled by the council, the city council shall have power to order and declare such grades to be changed and established in conformity to said resolution, which order shall be posted by the clerk on the chamber door of the council for five days."

Several differences must be noted: (1) No preliminary petition is required. (2) The contents of the resolution are prescribed. (3) The resolution need not be published more than twice. (4) No time is prescribed within which

the posting must be done. It would seem, however, that it should be done without delay. (5) The resolution changing grade must be posted.

§ 481. **Claims for Damages.**—Section 44 is similar to section 39 of the Vrooman Act.[3] It provides: "Within thirty days after the first posting of said order, as aforesaid any person, owning property fronting upon said portions of the street or streets where such change of grade is made, may file a petition with the clerk of the city council showing the fact of such ownership, the description and situation of the property, its market value, and the estimated amount of damages over and above all benefits which the property would sustain by the proposed change if completed. Such petition shall be verified by the oath of the petitioners or their agents." The only change is in regard to the time of filing claims.

§ 482. **Commissioners.**—Section 45 is a combination of sections 40, 41 and 42 of the Vrooman Act.[4] It provides: "Whenever such petition or petitions have been filed, the mayor, engineer or surveyor, and superintendent of streets of the city, or city and county, or board of public works if there be such board acting as a board of commissioners, shall assess the benefits, damages, and costs of the proposed change of grade upon each separate lot of land situated within such assessment district showing the same by a plat as said lot appears of record upon the last city, or city and county assessment-roll. The commissioners shall be sworn to make the assessments of benefits and damages to the best of their judgment and ability, without fear or favor. The commissioners shall have power to subpoena witnesses to appear before them to be examined under oath, which any one of said commissioners is authorized to administer."

[3] See ante, sec. 369.
[4] See ante, sec. 370 ff.

§ 483. **Damages and Benefits.**—Section 46 is the same as section 43 of the Vrooman Act. It provides: "The commissioners having determined the damage which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges, and expenses of the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvement; and during the progress of their work shall make a report to such city council as often as it may be required."

§ 484. **Report of Commissioners.**—Section 47 is a combination of sections 44 and a portion of 45 of the Vrooman Act. It provides: "The commissioners shall make their report, in writing, and shall subscribe to the same and file it with the city council. In their said report they shall describe separately each piece of property which will sustain damage, stating the amount of damages each will sustain over and above all benefits. They shall also give a brief description of each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of damages assessed against the same. In case the three commissioners do not agree, the award agreed upon by a majority of them shall be sufficient. In designating the lots to be assessed, reference may be had to a diagram of the property in the district affected; such diagram to be attached to and made a part of the report of the commissioners. If in case the commissioners find that conflicting claims of title exist, or shall be in ignorance or doubt of the ownership of any lot or land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any land or improvements, or particulars of their interest, shall not affect the validity of the assessment."

§ 485. **Notice of Hearing Report.**—Section 48 is similar to a portion of section 45 of the Vrooman Act. It is to be noted, however, that under this act the notice need be published but twice. Section 48 provides: "On the filing of said report, the clerk of said city council shall give notice of such filing by publication twice in one or more daily newspapers, or in a weekly or semi-weekly newspaper so published and circulated; and said notice shall require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on a day to be fixed by the city council and stated in said notice, which day shall not be less than twenty days from the first publication thereof."

§ 486. **Objections to Report.**—Section 49 is similar to a portion of section 46 of the Vrooman Act. It provides: "All objections shall be in writing and filed with the clerk of the city council, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the council, which shall fix a time for hearing the same; of which time the clerk shall notify the objectors in the same manner as are notified objectors to the original resolution of intention. At the time set, or at such other time as the hearing may be adjourned, the city council shall hear such objections and pass upon the same, and at such time shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given and had, as in the case of an original report." It is to be noted that this act provides for no notice to objectors to the original resolution of intention.

§ 487. **The Contract.**—Section 50 is similar to a portion of section 46 of the Vrooman Act. It provides: "In case the resolution of intention also provides for the assessing

upon the district the cost of regrading or repaving such street or streets to such changed or modified grade, after the report of the commissioners as to the damages caused by such change of grade has been passed upon by the city council, it shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking or curbing such street or streets with the same or other material with which the same had been formerly graded, paved, sewered, sidewalked, or curbed; first causing a notice, with specifications, to be posted conspicuously for five days on or near the council chamber door, inviting sealed proposals or bids for doing such work, and shall also cause notices of said work, inviting said proposals and referring to the specifications posted or on file, to be published twice, in a daily, semi-weekly, or weekly newspaper published and circulated in said city, and designated by the city council for that purpose. All proposals or bids offered shall be accompanied by a check, payable to the city, and certified by a responsible bank, which shall not be less than ten per cent of the aggregate of the proposals; or by a bond for said amount, signed by the bidder and two sureties, who shall justify under oath in double said amount over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall in open session publicly open, examine and declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by a check or a bond satisfactory to the council. The city council may reject any and all bids, and may award the contract to the lowest responsible bidder. If not accepted the city council may re-advertise for proposals or bids as in the first instance, and thereafter proceed in the manner in this section provided. All checks accompanying bids shall be held by the clerk until such successful bidder has entered into a contract, as herein provided; and in case he refuses so to do, then the amount of his certified check shall be declared

forfeited to the city, and shall be collected and paid into its general fund, and all bonds so forfeited shall be prosecuted, and the amount thereof collected and paid into such fund. Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore in this section provided for the posting of proposals for said work." It is to be noted that this act does not require an approval of the award.

§ 488. **The Assessment.**—Section 51 is practically the same as section 47 of the Vrooman Act. It provides: "After such contract has been awarded and entered into, the clerk of the city council shall certify to the city council that fact, together with the total amount of the cost of the same, whereupon the city council shall cause to be forwarded to the commissioners a copy of such certificate; whereupon such commissioners shall proceed to assess the cost of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the same, according to the benefits it receives from the work, and in the same manner in which the damages caused by the change of grade were assessed upon the same. Such commissioners in making such assessment shall show the total amount for which each lot or tract is assessed, in excess of all benefits, for the total cost of changing and modifying the grade of the street, as well as the regrading, repaving, sewering, sidewalking, and curbing of the same, and costs or damages connected therewith. The provisions of Part I of this act in regard to the mode or manner of the assessment of the cost of such work shall not apply to the work in this part contemplated; neither shall the provisions of this act in regard to the issuing of bonds to represent the cost of the same, nor the provisions in regard to the right of protest against the work apply."

§ 489. **Assessment-roll.**—Section 52 is the same as section 48 of the Vrooman Act. It provides: "The clerk of said city council shall forward to the street superintendent of the city a certified copy of the report, assessment, and plat, as finally confirmed and adopted by the city council. Such certified copy shall thereupon be the assessment-roll, the cost of which shall be provided for by the commissioners, as a portion of the cost of the proceedings therein. Immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein."

§ 490. **Collection of Assessments.**—Section 53 follows a portion of section 49 of the Vrooman Act. It provides: "The superintendent of streets shall thereupon give notice, by publication twice in one or more daily newspapers published and circulated in said city, or city and county, or in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of such delinquent assessment, together with the cost of advertising each delinquent assessment will be added thereto. When payment of any assessment is made to said superintendent of streets, he shall write the word 'Paid' and the date of payment opposite the respective assessment so paid, and the name of the persons by or for whom said assessment is paid, and shall give a receipt therefor. On the expiration of said thirty days, all assessments then unpaid shall be and become delinquent, and said super-

intendent of streets shall certify such fact at the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent. After the date of said delinquency no assessment shall be received unless said five per cent together with all costs be paid therewith."

§ 491. **Sale for Delinquency.**—The provision for sale for delinquency follows, in a general way, section 49 of the Vrooman Act.[5] It provides: "The said superintendent of streets shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece or parcel of land separately assessed. Said list of delinquent assessments, with a notice of the time and place of sale of the property affected thereby, shall be published twice in one or more daily newspapers published and circulated in such city, or in a weekly newspaper so published and circulated before the day of sale for such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of said superintendent of streets. If any assessment together with said penalty and costs be not paid before the time of sale the street superintendent shall proceed to sell and shall sell each lot, piece or parcel of land separately assessed at public auction to the bidder offering to pay the amount due for the least portion of such lot, piece or parcel of land so offered for sale, and shall issue a certificate therefor. If there be no bidder said property shall be struck off to the municipality."

The following differences should be noted: (1) The list, under this act, is to be published five days. (2) The proceedings are not governed by the general tax law. (3)

[5] See ante, secs. 381, 382.

If there be no bidder, said property shall be struck off to the municipality.

§ 492. **Redemption.**—The provision for redemption follows, in general, section 49 of the Vrooman Act. It provides: "All property sold shall be subject to redemption for one year by the payment of the amount of the assessment, penalty and costs and interest thereon at the rate of ten per cent per annum from the date of sale. The superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale, or his consignee, a deed conveying the property sold, and shall collect for each deed one dollar. The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee." It is to be noted that under this act redemption is not governed by the general tax law.

§ 493. **Payment of Funds to Treasurer.**—Section 56 follows a portion of section 49 of the Vrooman Act. It provides: "The superintendent of streets shall from time to time pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating each fund by the name of the street, square, lane, alley, court, or place for the change of grade for which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners or a majority of them."

§ 494. **Notice of Payment of Damages.**—Section 57 is the same as section 50 of the Vrooman Act. It provides: "When sufficient money is in the hands of the city treasurer, in the fund voted for the proposed work or improve-

ment, to pay the total cost for damages, as well as for the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which can be received at the office of such commissioners. Such notification may be made by depositing a notice, postage prepaid, in the postoffice, addressed to his last known place of residence. If, after the expiration of three days after the service or deposit of the notice in the post-office, he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer, to be delivered to him upon demand."

§ 495. **Eminent Domain Proceedings.**—Section 58 follows section 51 of the Vrooman Act.[6] It provides: "If the owner of any premises damaged neglects or refuses, for ten days after the warrant has been placed in the hands of the city treasurer, subject to his demand, to accept the same, the city council may cause proceedings to be commenced, in the name of the city, to condemn said premises, as provided by law under the right of eminent domain. The resolution of intention shall be conclusive evidence of the necessity of the same. Such proceedings shall have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of a special fund in the treasury for that purpose. At any time after the trial and judgment entered, or pending appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum from said fund to answer the judgment, and thereupon may authorize or order the municipality to proceed with the proposed work or improvements. In case of a deficiency in said fund to pay the whole assessed judgment and damages, the

[6] See ante, sec. 385.

city council may, in its discretion, order the balance thereof to be paid out of the general fund of the treasury, or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last named case, in order to avoid delay, the city council may advance such balance out of any available fund in the treasury, and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation; provided, that warrants for damages and for costs of performing the work shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money remains in the fund to pay all warrants of the first class before paying any of the second. The provisions of section one thousand two hundred and fifty-one of the Code of Civil Procedure, requiring the payment of damages within thirty days after the entry of judgment, shall not apply to damages rendered in proceedings under this act. All provisions contained in Parts I and IV of this act, which provisions are not in conflict herewith, shall apply to all matters herein contained."

DIVISION 3.

THE BOND PROVISIONS.

§ 496. In general.
§ 497. When bonds may be issued.
§ 498. Term of bonds.
§ 499. Resolution of intention.
§ 500. Time for issuance of bond.
§ 501. Form of bond.
§ 502. No bond for less than twenty-five dollars.
§ 503. Right of owner to stop issuance.
§ 504. Description of bonds—Conclusive evidence clause.
§ 505. Penalty for default.
§ 506. Sale of property.
§ 507. Treasurer's affidavit.
§ 508. Costs and fees.
§ 509. Treasurer's record.
§ 510. Purchaser's lien.
§ 511. Redemption.
§ 512. Recording certificate of sale.
§ 513. Proceedings for deed.
§ 514. Deed as evidence.
§ 515. Procedure for enforcing duty of railroads.

§ 496. In General.—Part III of the Improvement Act of 1911 provides for the issuance of bonds to represent certain assessments for work authorized by the act. It follows the procedure of the Bond Act closely, departing from it in but few instances. Hence I shall merely state the provisions, pointing out the differences, and referring to the discussion of the Bond Act for details.

§ 497. When Bonds may be Issued.—Section 59 is as follows: "The city council of any municipality in this state shall have the power, in its discretion, to determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in Part I of this act." This is similar to the authority granted by the Bond Act. The difference is

that the Bond Act applies only to proceedings under the Vrooman Act, while this applies only to proceedings under the Improvement Act of 1911.

§ 498. **Term of Bonds.**—Section 60 is similar to section 2 of the Bond Act.[1] It provides: "Said serial bonds shall extend over a period not to exceed nine years from the second day of January next succeeding their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year, at the rate of not to exceed ten per cent per annum on all sums unpaid, until the whole of said principal and interest are paid.

"Said bonds and interest thereon shall be paid at the office of the city treasurer of said municipality, who shall keep a fund designated by the name of said bonds, into which he shall receive all sums paid him for the principal of said bonds and the interest thereon, and from which he shall disburse such sums, upon the presentation of said coupons; and under no circumstances shall said bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee and indorsees of each bond, and the number and amount of each coupon of principal or interest paid by him, and shall cancel and file each coupon so paid." The only difference is in the due date.

§ 499. **Resolution of Intention.**—Section 61 is the same as section 3 of the Bond Act.[2] It provides: "When said city council shall determine that serial bonds shall be issued

1 See ante, sec. 387.
2 See ante, secs. 392–395.

to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section twenty-two of this act."

§ 500. **Time for Issuance of Bond.**—Section 62 is the same as a portion of section 4 of the Bond Act.[8] It provides: "After the full expiration of thirty days from the date of the warrant, or if an appeal be taken to the city council as provided in this act, then five days after the final decision of said council, and after the street superintendent shall have recorded the return, as provided in section twenty-five hereof, the street superintendent shall make and certify to the city treasurer a complete list of all assessments unpaid, which amount to twenty-five dollars or over, upon any assessment or diagram number; and said treasurer shall thereupon make out, sign, and issue to the contractor, or his assigns, payee of the warrant and assessment, a separate bond, representing upon each lot or parcel of land upon said list the total amount of the assessments against the same, as thereon shown. And if said lot or parcel of land is described upon said assessment and diagram by its number or block, or both, and is also designated by its number or block, or both, upon the official map of said municipality, or upon any map on file in the

[8] See ante, secs. 397–399.

office of the county recorder of the county in which said municipality is situated, then it shall be in said bond a sufficient description of said lot or parcel of land to designate it by said number or block, or both, as it appears on said official or recorded map."

§ 501. **Form of Bond.**—Except for the difference in the term, the form prescribed by this act is the same as that prescribed by the Bond Act. Section 63 provides: "Said bond shall be substantially in the following form:

"Street Improvement Bond.

"Series (designating it), in the city (or other form of the municipality) of (naming it).

"$———— 100. No. ————

"Under and by virtue of an act of the legislature of the state of California (title of this act), I, out of the fund for the above designated street improvement bonds, series ———, will pay to ———, or order, the sum of ———— dollars ($————) with interest at the rate of ———— per cent per annum, all as is hereinafter specified, and at the office of the ———— treasurer of the ———— of ————, state of California. This bond is issued to represent the cost of certain street work upon ————, in the ———— of ————, as the same is more fully described in assessment number ————, issued by the street superintendent of said ————, after his acceptance of said work, and recorded in his office. Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and in the diagram attached thereto, as number ——— and which now remains unpaid, but until paid, with accrued interest, is a first lien upon the property affected thereby, as the same is described herein, and in said recorded assessment with its diagram, to wit: the lot or parcel of land in said

———— of ————, county of ————, state of California, ————.

"This bond is payable exclusively from said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise of its principal or interest. The term of this bond is ———— years from the second day of January next succeeding its date, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the second day of January of each year after its date an even annual proportion of its whole amount is due and payable, upon presentation of the coupon therefor, until the whole is paid, with all accrued interest at the rate of ———— per centum per annum.

"The interest is payable semi-anually, to wit: on the second days of January and of July in each year hereafter, upon presentation of the coupons therefor, the first of which is for the interest from date to the next second day of ————, and thereafter the interest coupons are for semi-annual interest, except the last, which is for interest from the semi-annual payment next preceding and to the date of the final maturity of this bond.

"Should default be made in the annual payment upon the principal, or in any payment of interest from the owner of said lot or parcel of land, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have said lot or parcel of land advertised and sold forthwith, in the manner provided by law.

"At said ———— of ———— this ——— day of ———, in the year one thousand ——— hundred and ———.

————————————,

"City Treasurer of the ———— of ————."

§ 502. No Bond for Less Than Twenty-five Dollars.— Section 64 is taken from section 4 of the Bond Act. It

provides: "In case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is hereinbefore provided in part one of this act."

§ 503. Right of Owner to Stop Issuance.—Section 65 is taken from section 4 of the Bond Act. It provides: "If any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records that he is such owner of record, and with such affidavit and certificate such person notifies said treasurer in writing that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection as if said lot or parcel of land had not been so listed by the street superintendent."

§ 504. Description of Bonds — Conclusive Evidence Clause.—In the main, section 66 is taken from section 4 of the Bond Act. It provides: "The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work. They shall have annual coupons attached thereto, payable in annual order, on the second day of January in each year after the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, the first of which shall be payable upon the second day of January or July, as the case may be, next after its date, and shall be for the interest accrued

at that time, and the last of which shall be for the amount of interest accruing from the second day of January or July, as the case may be, next preceding the maturity of said bonds to the maturity thereof. The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under this act."

In interpreting the conclusive evidence clause, the Supreme Court has held it unconstitutional in so far as it attempts to make the bond conclusive evidence of necessary jurisdictional steps.[4] It was held that it is within the province of the legislature, by a curative act, to cure all defects in proceedings which could originally have been dispensed with by the legislature, but that this is the limit to which a curative act can go.

§ 505. Penalty for Default.—Section 67 is taken from section 5 of the Bond Act. It provides: "Whenever, through the default of the owner of any lot or parcel of land to represent the assessment upon which such bond has been, or may hereafter be, issued, and payment, either upon the principal, or of the interest, has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond thereupon demands, in writing, that the said city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the

[4] See ante, secs. 401–403. See, also, Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; Chase v. Trout, 146 Cal. 350, 80 Pac. 81; Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent."

§ 506. **Sale of Property.**—Section 68 is taken from section 5 of the Bond Act. It provides: "Upon the application of the holder of any bond that is now or shall hereafter become delinquent as hereinbefore provided, the said city treasurer shall publish twice in a newspaper of general circulation, to be designated by him, published in the city where his office is situated, a notice which must contain the date, number, and series of the delinquent bond, a description of the property mentioned in said bond, and the name of the owner of such property (if known), and if unknown the fact shall be so stated, the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the cost of publication of such notice are paid, the real property described in said bond will be sold at public auction on a day to be therein fixed, which shall not be less than fifteen nor more than thirty days from the day of the first publication of said notice, and the place of such sale, which must be the office of the said city treasurer.

"A like notice shall not less than fifteen days before the day of sale so fixed be served upon any such owner if known, either personally or by depositing the same in the postoffice at such city, addressed to such owner at his address, if known, with the postage thereon prepaid.

"At any time prior to the sale, the owner or person in possession of any real estate offered for sale under the provisions of this act may pay the whole amount of said bond then due, with costs, and such bond shall thereupon be canceled; but in case such payment is not made by such owner, or person in possession, or by someone in behalf of such owner, or person in possession, the property subject

thereto shall be sold at public auction to the bidder offering to pay the amount due on the bond with costs for the least portion of such lot or parcel of land offered for sale."

Two differences must be noted: (1) Under this act, the delinquent list is required to be published only twice. (2) The requirement for personal service is an addition.

§ 507. **Treasurer's Affidavit.**—Section 69 is taken from subdivision b of section 5 of the Bond Act. It provides: "The city treasurer, before the day of sale hereinafter provided for, must file with the city clerk a copy of the publication, with an affidavit of the publisher of such newspaper, or someone in his behalf, attached thereto, that it is a true copy of the same; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication was made—which affidavit is prima facie evidence of all the facts stated therein."

§ 508. **Costs and Fees.**—Section 70 is taken from subdivision c of section 5 of the Bond Act. It provides: "The city treasurer must collect, in addition to the amount due on such bond, the cost of the publication of such notice, and fifty cents for the certificate of sale delivered to the purchaser as hereinafter provided."

§ 509. **Treasurer's Record.**—Section 71 is the same as subdivision f of section 5 of the Bond Act. It provides: "The city treasurer, before delivering any certificate of sale must, in a book kept in his office for that purpose, enter the date, number and series of the bond, a description of the land sold corresponding with the description in the certificate, the date of sale, purchaser's name, the amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection during office hours when not in actual use, and he

shall enter on the record of the bond the words 'canceled by sale of the property,' giving the date of such sale."

§ 510. **Purchaser's Lien.**—Section 72 is the same as subdivision g of section 5 of the Bond Act: "Immediately on the sale, the purchaser shall become vested with a lien on the property, so sold to him, to the extent of his bid, and is only divested of such lien by the payment to the city treasurer of the purchase money, including costs herein provided for, with interest thereon at the rate of one per cent per month from the date of sale."

§ 511. **Redemption.**—Section 73 is the same as subdivision h of section 5 of the Bond Act. It provides: "A redemption of the property sold may be made by the owner of the property, or any party in interest, within twelve months from the date of purchase, or at any time prior to the application for a deed, as hereinafter provided. Redemption must be made in lawful money of the United States, and when made to the city treasurer he must credit the amount paid to the person named in his certificate, and pay it on demand to him or his assignees."

§ 512. **Recording Certificate of Sale.**—Section 74 is the same as subdivision i of section 5 of the Bond Act. It provides: "On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the city treasurer, the fee for which shall be fifty cents, and on presentation of the receipt of the city treasurer for the total amount of the redemption money, the recorder must, without charge, mark the word 'redeemed,' the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made."

§ 513. **Proceedings for Deed.**—Section 75 is the same as subdivision j of section 5 of the Bond Act. It provides: "If the property is not redeemed within the time allowed

by the provisions of section seventy-three hereof for its redemption, the city treasurer, or his successor in office, upon application of the purchaser or his assignee, must make to said purchaser, or his assignee, a deed to the property, reciting in the deed, substantially, the matter contained in the certificate and that no person has redeemed the property during the time allowed for its redemption; the treasurer shall be entitled to receive from the purchaser two dollars for making said deed, which shall be deposited in the city treasury for the use of the city after payment has been made therefrom for the acknowledgment of said deed; provided, however, that the purchaser of the property, or his assignee, or agent must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate of sale, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties, and costs in this act required. In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; and no deed to the property sold, in accordance with the provisions of this act, shall be issued by the city treasurer to the purchaser of such property, until such purchaser shall have filed with such treasurer an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and pre-

served by the said treasurer as other records kept by him in his office. Such purchaser shall be entitled to receive the sum of fifty cents for his service of such notice and the making of such affidavit, which sum of fifty cents shall be paid by the redemptioner at the time and in the same manner as the other sums, costs, and fees are paid."

§ 514. **Deed as Evidence.**—Section 76 is the same as subdivision k of section 5 of the Bond Act. It provides: "The deed, when duly acknowledged or approved, is primary evidence of the regularity of all proceedings theretofore had and shall be conclusive evidence of all things of which the bond upon which it is based is conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issue of the bond, and conveys to the grantee the absolute title to the lands described therein, free of all encumbrances, except the lien for state, county, and municipal taxes."

§ 515. **Procedure for Enforcing Duty of Railroads.**—Section 77 prescribes a procedure for the enforcement of the duty of railroads to pave and repair streets. In most respects, this is similar to the corresponding procedure prescribed by the Vrooman Act.[5]

"Whenever any railroad track or tracks of any description exist upon the street or streets upon which the city council of any city has ordered an improvement to be made, and has excepted therefrom the portions used by the track, between the rails and for two feet on each side thereof, and between the tracks if there is more than one, the said order, unless said city council shall by resolution theretofore passed have declared the contrary, shall be deemed to be and constitute a requirement that the person or company having said railroad track or tracks thereon shall improve the said por-

[5] See ante, secs. 342–347. As to the procedure under the Bond Act, see ante, secs. 420–430.

tion with improvements similar in all respects to, with the same materials, under the same specifications and superintendence, and to the like inspection and satisfaction as those ordered to be performed by said order ordering the work; provided, however, that the city council may by ordinance require increased depth of concrete between, to the full depth of, or under the ties, or both, where and whenever the city council shall, in its judgment decide that this method of construction is necessary. The city council may also require by ordinance or otherwise, any person or company aforesaid, to pave alongside of and contiguous to its rails with special types of brick or paving blocks. The resolution of intention and notice of proposed improvement shall be construed and are hereby declared to be notice to said person or company of the intention to order the same. Thereupon it shall be the duty of said person or company having such track or tracks on such street or streets to notify in writing the superintendent of streets if such person or company elects to enter upon the direct performance of such work at its own charge and expense; said notice must be delivered to the superintendent of streets within ten days after the first publication of notice of award of contract. The omission or neglect to make such election shall be construed as constituting the superintendent of streets the agent of the owner of said track or tracks, with authority to enter into a contract made in accordance with the provisions of this section for making the said improvements. Said superintendent of streets shall advertise for bids for the improvement of said portions of the street or streets lying between the rails and for two feet on each side thereof, and between the tracks, if there be more than one. It shall be the duty of said city council to award the contract for the making of said improvements to the lowest regular responsible bidder. Such bidding and awarding of contracts shall be made in the same manner hereinbefore provided for the awarding of contracts for improvements

excepting that no notice of award shall be published. Immediately upon the award, the superintendent of streets shall enter into a contract with the person to whom said contract was awarded for the making of said improvement or improvements upon the portions of the street or streets described in said notice inviting bids, and at the price stated in said bid. The contractor shall execute bonds in the manner required by section fifteen of this act. Upon the completion of the work and its acceptance, the street superintendent shall make a certificate of such completion together with a statement of the amount due under the terms of said contract for the performance of said work. Such certificate shall be countersigned by the mayor of said city, and shall be recorded in the office of said superintendent of streets. The contractor thereupon shall be entitled to payment of the full amount of said contract price, and the recording of such certificate shall be sufficient notice to the owner of such track or tracks that said contract price is due and payable. In the event that such amount is not paid within thirty days from the date of the recording of said certificate, the contractor may file a sworn statement to that effect with the superintendent of streets, who shall record the same in his office in the book in which the certificate of acceptance has been recorded. Said contractor shall thereupon have a cause of action against said person or company owning said tracks for the amount of said contract, together with a reasonable attorney's fee, and shall also have as a security for the recovery of such amount, a first lien upon the track and franchises of said railroad, between whose rails or tracks the said work has been performed, contained within the corporate limits of the said city. In such suit, the certificate of the superintendent of streets, hereinbefore mentioned, shall be and constitute prima facie evidence of the regularity of all proceedings, and of the right of the contractor to recover judgment against said person or company. Execution may be taken out upon the

entry of judgment, and levied upon any property of said person or company subject to execution. In the event that said person or company shall file the written election to enter upon the direct performance of such work at its own cost and expense, no further proceedings shall be taken in the matter unless such person or company neglects or fails for thirty days, or for such further time as the city council may grant, to make said improvement. In the event that the improvement of the portions of the street or streets above described between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, shall not be made with diligence, as herein provided or in all respects similar to the improvement of the rest of the street, or with the same materials or under the same specifications, and to the satisfaction of the superintendent of streets, the city council of said city may, by resolution entered in its minutes, prescribe such terms and conditions as to it may seem fit and proper before permitting the said person or company to continue with the said improvement. If the said person or company shall, after three days' notice of the adoption of said resolution, fail to comply with the terms and conditions so prescribed, the city council may declare said person or company to have forfeited its privilege of performing such work under its own direction. Whereupon the street superintendent shall advertise for bids for the performance of such work, or such portion thereof as may remain uncompleted, and the contract therefor shall be awarded and entered into in the same manner hereinbefore provided for the awarding and execution of contracts where said person or company has not elected to make the improvements under its own direction; and upon the completion of the improvement the contractor to whom such contract may be awarded, or his assigns, shall be entitled to a certificate from the street superintendent similar to that hereinabove provided for, and shall have the right to collect from said person or company by suit the amount

specified in said certificate in all respects the same as hereinbefore provided where the contract is let for such improvement in the first instance. The city council may, by ordinance, prescribe and enforce such additional regulations and penalties as it may deem necessary to compel the improvement as herein provided of any portion or portions of any such street or streets so occupied by any such railroad track or tracks."

And section 78 provides: "None of the provisions of Part I of this act in regard to a protest against the work shall apply to any work contemplated by the preceding section. All provisions of Part I of this act not inconsistent with the provisions hereof shall apply hereto."

CHAPTER IV.

THE LOCAL IMPROVEMENT ACT OF 1901.

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§ 516. Scope of the Act.—The Local Improvement Act of 1901 prescribes an alternate procedure for practically the same work that is authorized by the Vrooman Act. The first two sections of the two acts are quite similar. The chief difference to be noted is that the Local Improvement Act authorizes a provision for maintenance of the work, which is not allowed under the Vrooman Act.[1] For the most part, the discussion of the first two sections of the Vrooman Act is applicable here, and need not be repeated.[2] Section 1 provides: "All streets, lanes, alleys, places, or courts in the municipalities of this state, now open or dedicated, or which may hereafter be opened or dedicated to public use, shall be deemed and be held to be open public streets, lanes, alleys, places, or courts, for the purposes of this act, and the legislative body of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in section 2 of this act, under the proceedings hereinafter described."

And section 2 provides: "Whenever the public interest or convenience may require, the legislative body is hereby authorized and empowered to order the whole, or any por-

1 See ante, sec. 124.
2 See ante, secs. 50–54.

tion, either in length or width, of the streets, avenues, lanes, alleys, courts, or places of any such municipality graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, sewered or resewered, supplied or resupplied with drains for storm-water or other purposes, and to order sidewalks, parkways, manholes, catch-basins, culverts, cesspools, gutters, tunnels, curbing and cross-walks to be constructed therein, or to order breakwaters, levees, or walls of rock, or other material, to protect the same from overflow or injury and to order any other work to be done which shall be necessary to complete the whole or any portion of said streets, avenues, sidewalks, lanes, alleys, courts, or places, and it may order any of the said work to be improved, and also to order a sewer or sewers, with outlets, for drainage or sanitary purposes, in, over, or through any right of way granted or obtained for such purpose; and to provide for the maintenance of any such work."

§ 517. **Constitutionality.**—While the constitutionality of this act has not been directly passed upon by the higher courts, its validity appears certain. The method of assessment according to benefits, with notice to the owners and a right to a hearing, has been repeatedly approved by our Supreme Court and by the Supreme Court of the United States.[3] The right to sell for nonpayment of assessments is one of the incidents of the power of taxation. The bond provisions clearly do not contravene any rights of the owner, for they merely offer him an option. Hence, the argument advanced against the validity of the Bond Act that a long time lien is imposed against the owner's will is of no weight.[4] It is not necessary to defend the interest charge

[3] See ante, secs. 6–14.

[4] See ante, sec. 389.

as a penalty for delinquency.[5] It is rather a premium which the owner pays for the privilege of securing the benefits of paying in installments. The act imposes a lien only upon the property benefited, and does not seek to charge the owner with any personal liability.

§ 518. **Outline of the Procedure.**—In outline the procedure under this act is as follows: (1) Before ordering the work, the council must refer it to the city engineer and instruct him to report in writing his recommendations as to the best method for doing the work. (2) He thereafter files his report, annexes a map similar in many respects to the diagram required by the Vrooman Act, describes the district benefited, estimates the cost, and suggests the assessment upon each parcel. (3) The legislative body thereupon fixes a time for hearing, and causes notice to be given. Interested parties may then file objections. (4) At the time fixed, a hearing must be had, after which the legislative body passes a resolution setting aside, modifying, or confirming the report. When the report is confirmed or modified, the lien attaches. An action to contest the assessment must be brought within thirty days thereafter. (5) After all suits are determined, the assessments are collected by the tax collector. The owners, by signing an agreement, may have the privilege of paying in installments. Bonds are issued to cover these, and are sold. Delinquent assessments are collected by a sale of the property. (6) After all the money is collected, the legislative body advertises for bids, lets the contract, and, upon completion, the expense is paid out of the fund on hand. (7) If the cost exceeds the amount on hand, a procedure is provided for a second assessment.

§ 519. **Resolution Referring Work to Engineer.** — The first step in the proceedings is the passage of a resolution

[5] This is the argument in support of the interest provision in the Bond Act: See ante, sec. 389.

referring the proposed work "to the city engineer, if there be one, and, if not, to some engineer employed by them for the purpose and named in the resolution, and instructing him to make to the legislative body a report in writing, containing his recommendations as to the best method of doing said work or of making said improvement, to which report shall be attached the exhibits hereinafter referred to."[6] The purpose of this resolution is very different from that of the resolution of intention under the Vrooman Act. This resolution is not intended to give notice; and hence it would seem that the same strict rules should not apply. Probably the passage of this resolution is jurisdictional. In terms, it requires three things: (1) A reference of the "proposed work"; (2) a designation of an engineer, if there be no city engineer; (3) an instruction to report. (1) The reference of the "proposed work" implies that the work shall be described. The purpose of the description is to enable the engineer to report. Hence, any description which will enable him to make the report should be sufficient. Thus, it would seem that a description similar to that required in the resolution of intention under the Vrooman Act would be sufficient.[7] Whether it needs to be as full as that depends upon the construction given to the words "proposed work" and "best method." If these are construed to mean that the council is to decide only that a certain street is to be improved and that the engineer is then to recommend how it shall be improved, it need not be so full. If, on the other hand, they are construed to mean that the council is to decide upon the nature of the improvement and the engineer is merely to recommend plans and specifications, and to furnish estimates and data for assessments, it certainly should contain as full a description as the resolution of intention. Thus, under that

[6] Sec. 3.

[7] See ante, sec. 69 ff.

construction, it should state the character of the work and the materials to be used. It seems to me that the latter interpretation is the better. The words "proposed work" further imply that the resolution should state the extent of the improvement. It is not necessary, however, that it describe the district to be benefited and assessed, for that is to be suggested by the engineer.[8] (2) The designation of the engineer, it would seem, may be made by simply naming him, although it may be better to state specifically that he is a civil engineer, and is "hereby employed and named" for the purpose. (3) The instruction to report may be in substantially the language of the statute. In addition, where maintenance is to be required, it is well so to state in this resolution.

§ 520. **The Engineer's Report—In General.**—The filing of the report by the engineer is the next step in the proceedings. Its contents are prescribed by section 4. "Such a report by the engineer as is contemplated by section 4 of the act is essential to the jurisdiction of the legislative body to proceed in the matter of levying the assessment. By the express provisions of sections 3 and 5, it is only 'after' such a report has been filed that such body 'have the power' to proceed. A substantial compliance, at least, with the provisions of section 4 in the matter of such report is certainly essential to jurisdiction."[9] It becomes important, therefore, to determine just what such report should contain.

§ 521. **Same—Description of the Work.**—Section 4 provides in part: "Thereafter, the said engineer shall file with the clerk of the municipality the report called for by section 3 above, and annex thereto the following exhibits, to wit: 1. A description of the work to be done."

[8] Sec. 4, subd. 2.

[9] Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

The exhibits comprise practically all the matters required. Hence it would seem that the main body of the report need do little more than refer to the exhibits. The first exhibit evidently is intended to be a general description of the work, describing the general nature of what has been proposed and stating the boundaries within which the work is to be done. A description similar to that required in the resolution of intention under the Vrooman Act would certainly be sufficient.[10] The description should conform in general to the description contained in the resolution referring the work to the engineer. Inasmuch, however, as subdivision 3 requires the engineer to attach as an exhibit "plans, profiles, cross-sections and specifications of the work required in order to accomplish said improvement," it would seem that the description may be helped by a reference to such plans. The plans, profiles, cross-sections and specifications should be so definite as to enable the contractor to know just what is required of him. In general, what has already been said as to specifications under the Vrooman Act applies here.[11] Thus, there must be no improper delegation of authority. The rule forbidding the requirement of a bond to keep the street in repair for a given number of years is not applicable; for this statute expressly authorizes the legislative body to provide for the maintenance of the work. This matter will be discussed more fully later.

§ 522. Same—When More Than One Street may be Included.—The first subdivision of section 4 provides that "said work may include one or more streets in the same proceeding." This does not mean that streets in widely separated parts of the city may be included. In interpreting this, the Supreme Court has said: "In view of the

[10] As to the description of the work in the resolution of intention under the Vrooman Act, see ante, sec. 69 ff.

[11] See ante, secs. 120–128.

other provisions of the act we think the provision referred to means no more than this: It was contemplated that some particular improvement, constituting what might reasonably be called an entirety but including more than one street, might be of special benefit, as distinguished from the general benefit to all the property of the city, to property in its immediate vicinity, and that it would be proper to authorize the formation of an assessment district including all such property. Hence the authorization to include more than one street in the same proceeding. But clearly there is to be but one 'district' in any proceeding, and as we understand the word 'district' in the connection in which it is used, it means a single portion of the territory of the city set off as being specially benefited by a street improvement to be made therein. Learned counsel relies somewhat on the fact that it has been held that in the case of improvements under the Vrooman Act, work on different streets may be included in one resolution of intention. But it was declared in the first opinion so holding that the work on each street was a distinct and several improvement and that its distinct and several character is to be observed in the subsequent proceedings. It may be that under the act before us various streets in widely separated sections of the city may be included in the preliminary resolution referring the work to the engineer for consideration, but it seems clear to us that if he finds that the work to be done embraces in the matter of special benefit separate and distinct districts, he must make a separate report as to each of such districts, so that the expense of the work in any one district may be apportioned to and borne by the property of that district alone.'' [12]

12 Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610. The reasoning of the court is instructive. Angellotti, J., said: "It was never designed by the authorization to 'include one or more streets in the same proceeding' to empower the legislative body to

§ 523. Same—Description and Map of District.—Subdivision 2 of section 4 requires the engineer to annex to his report "a description of the exterior boundaries of

so include in one proceeding street work in widely separated sections of a city as to result in imposing a portion of the cost of improving a street in one of such sections on property not benefited thereby, situated in the other section, simply because it is benefited to some extent by an improvement made upon another street in the section in which it is located. . . . . The proposed improvements in one section are a matter of no special concern whatever to the property owners in the other section. Yet the cost of *all* the improvements is necessarily taken into consideration in fixing the amount of assessment on each lot, that aggregate cost being apportioned to each lot in one section in proportion to the special benefit it will derive from the improvements to be made in that section alone. The cost of the latter improvements should alone be considered with reference to such property. The projected improvement may be much more costly in one section than it is in the other, while the benefit to the property in each section from the improvements made therein may be as great in the one section as in the other. In such a case the cost of all being apportioned according to the benefit to each parcel of land in both sections would necessarily result in imposing a portion of the expense of the more costly work upon the property of the section in which it is not located. If the first assessment prove insufficient to complete the whole improvement, a second may be made in the same manner as nearly as may be. Such insufficiency may be due wholly to a greater expense in doing the work in one of the sections, and yet the property of the other section will be called upon to assist in supplying the deficiency, the proportion of benefit from the whole improvement having already been established by the proceedings on the first assessment. If a larger sum is realized from an assessment than is necessary for the whole improvement, the excess is to be refunded 'pro rata to the parties by whom it was paid.' Such an excess may be entirely due to an over-estimate as to the improvements in one only of the sections. In such event, unless the property owners in the other section have already paid something on account of the work in the former section as to which the over-estimate occurred, they should not, of course, participate in the return. We mention these things to show the impracticability under the act before us of uniting in one proceeding and assessment improvements in two widely separated sections of a city, where the property of one section derives no special benefit from the improvement in the other section, in a manner that would place the cost of the improvement upon the property in proportion to the special benefit accruing from the improvement."

the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof." The Supreme Court has said that this description should be as certain and definite as it can be made.[13] This requirement is essentially the same as the requirement for the resolution of intention under the Vrooman Act where the work is done upon the district plan. Hence what has already been said as to that is applicable here.[14] Subdivision 5 requires that he also annex "a map showing the district above referred to, and also the subdivisions of the property within said district, as ascertained by said engineer, each of which subdivisions shall be given upon said map a separate number in red ink." This corresponds to the diagram required by section 8 of the Vrooman Act.[15] Its purpose is the same, viz., to exhibit the property so that its liability for assessments may appear.

§ 524. **Same—Estimates.**—Subdivisions 4, 6, and 7 of section 4 require exhibits of estimates to form the basis for the assessment. Subdivision 4 requires "an estimate of the expense of said improvements, deducting therefrom the estimated cost of so much, if any, of said improvements as may be by law required to be done by railroads having tracks upon the streets affected." As we have already seen, railroad companies are required by law to keep in condition the portion of the street between their tracks and two feet on each side thereof.[16] This act, however, makes no provision for enforcing this duty. Inasmuch, then, as the railroad is compelled to keep a certain portion of the street in order, it would seem that the description of the work, as required by subdivision 1, should

[13] Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

[14] See ante, sec. 88.

[15] As to the diagram under the Vrooman Act, see ante, secs. 212, 213.

[16] See Civ. Code, sec. 498.

except such work. Such is the rule under the Vrooman Act,[17] although that act expressly provides for such an exception. Since the work to be done evidently is not intended to include the railroad part, the exception should have been stated in subdivision 1. As the statute stands, however, this exhibit should show that the cost of the work on any part required to be kept in order by a railroad company has been deducted.[18] Subdivision 6 requires "a list referring to the said subdivisions upon said map by the respective red ink numbers thereof, and showing the names of the owners, if known, otherwise designating them as unknown, and the valuations of said respective subdivisions, as the same appear upon the last assessment-roll of said municipality, if they so appear, otherwise as estimated by said engineer, also the dimensions, areas, and his estimates of the benefits which the respective parcels will receive from said improvement." All of these matters, including the dimensions and the area, should be stated; for without them it is probable that jurisdiction could not be acquired.[19] Under the Vrooman Act, an error in stating the name of an owner prevents a recovery. It is said to be the duty of the superintendent of streets, if he cannot definitely ascertain the name of the owner, to assess to unknown owners.[20] While it may be questionable whether this strict rule would be applied here, it certainly is a better and safer practice to designate property as belonging to unknown owners in all cases where the ownership is at all doubtful. Subdivision 7 requires an exhibit of "an estimate of all incidental expenses likely to be incurred in connection with the work, such as clerical, engineering, inspection, printing and advertis-

[17] See ante, sec. 81.

[18] In reality this provision is an absurdity. The engineer is to include in the cost, apparently, a charge for work not to be done, and then deduct it again.

[19] Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

[20] See ante, sec. 211.

ing." The purpose of this is to enable the legislative body to determine what the total assessment must be. Probably this exhibit need not go into detail.[21]

§ 525. **Resolution Adopting Report—In General.**—Section 5 provides: "After the report of the engineer provided for in the next preceding section has been filed with the clerk of the municipality, the legislative body of said municipality shall consider the same and have the power, by resolution, to adopt the same as filed by said engineer, or as modified by the legislative body, and levy the assessment accordingly, but the same shall not constitute a lien until all parties interested have had an opportunity to be heard as hereinafter provided." In a general way, this resolution corresponds to the resolution of intention under the Vrooman Act. Its purpose is to advise parties interested of the intention to do the work. It is a much more detailed affair, however, for it, together with the report, furnishes most minute information in regard to the work. It is not necessary that the report be adopted exactly as presented, for the legislative body is authorized to modify it without sending it back to the engineer. Just how far the report may be changed has not been decided. It would seem, however, that the work ordered should be the same as that referred to the engineer. The provision that the assessment shall not be a lien until all parties interested have had an opportunity to be heard was evidently inserted out of an abundance of caution, and to make the act free from any possible objection that it deprives persons of property without due process. In reality, the provision is superfluous, for section 8 states when the lien attaches.

21 Thus, the Bond Act formerly authorized the issuance of bonds in cases where the council shall find, upon estimates of the city engineer, that the work will cost more than fifty cents per front foot. It has been held that the estimate of the engineer need not be detailed: O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020. The same principle would seem to apply here.

§ 526. **Same—Contents.**—The resolution should refer to the report in such a way as to identify it, and should expressly adopt it, either as presented or as modified. In addition, section 5 requires that it contain six matters: (1) The rate of interest to be charged on deferred payments. Deferred payments are provided for in section 13. Section 5 provides that the rate must not exceed seven per cent per annum. (2) The time to be allowed upon deferred payments. This is limited by section 13, which provides that deferred payments shall be made "in yearly installments not to exceed ten in number, the first of which shall be paid at the time said agreement is filed, and the others annually thereafter." In other words, the time must not be more than nine years. (3) The rate of interest to be allowed upon bonds issued to cover deferred payments. This rate must not exceed seven per cent; but there is no requirement that it be the same as that fixed for the agreements. In fact, the statute seems to contemplate that a different rate may be fixed. (4) The time for which bonds issued to cover deferred pavments are to run. By the terms of section 18, this must not exceed ten years. (5) "The day and hour when and where any and all persons may appear before the legislative body and show cause, if any they have, why said improvement provided for in said resolution should not be carried out in accordance therewith; said time to be not less than thirty nor more than sixty days from the date of the passage of said resolution." The resolution should designate the newspaper in which notice of the hearing shall be published and direct publication and posting. Section 6 provides for publication, but does not expressly provide how the paper shall be designated. (6) "A description of the exterior boundaries of the district declared by the legislative body to be benefited by the proposed improvement and assessed to pay the costs and expenses thereof." We have already discussed the matter of such a description.

§ 527. **Same—Provision for Maintenance.** — Section 5 further provides that "in the same resolution the legislative body shall provide, if they so determine, that the work covered by said resolution shall include maintenance thereof for a stated number of years to be fixed by said resolution." No method of providing for maintenance is here prescribed. This provision, however, must be read in connection with section 19, where it is provided that "the legislative body may require, and, if so, it must be stated in the original resolution and petition and in the notice for bids, that the contractor to whom the work is awarded shall furnish the municipality with a bond in such sum and with such responsible surety corporation (legally qualified to carry on business in the state of California), as guarantor, as shall be approved by said legislative body, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for such period as may be designated by said legislative body." It will be noted that this provides for a very limited maintenance. In fact, it does not provide for defects resulting from wear or tear, and really amounts to little more than a guaranty that the work shall be well done; but even this is more than can be done under the Vrooman Act.[22] It is possible that section 5 may authorize a broader provision for maintenance; but a comparison of the two provisions would seem to indicate that they are intended to refer to the same thing. Reading the words "it must be stated in the original resolution and petition" in section 19 with section 5, it seems to me that the meaning is that the statements referred to must be contained in the resolution approving the report of the engineer, and not in the resolution referring the work to

22 Under the Vrooman Act it is held that the requirement of a bond to keep the work in repair makes the proceedings void, because it tends to increase the cost by an unauthorized burden upon the contractor: See ante, sec. 124.

the engineer. The word "petition" is meaningless, for the act provides for no petition. The fact that section 5 requires such a statement in the resolution approving the report seems to indicate that it is the "original resolution" referred to. Moreover, the reason for requiring it to be stated in any resolution is to give notice to property owners, and this is accomplished by including it in the resolution provided for in section 5. As a precautionary measure, it is well to state these facts in the resolution referring the work to the engineer, and to have him embody the same in his report. This is advisable also for the reason that unless maintenance is provided for in the report, a new assessment may have to be made to cover the increased cost incident to the giving of the bond.

§ 528. **Notice of Passage of the Resolution—In General.** Section 6 provides for posting and publishing notices of the passage of the resolution and of the time set for hearing. "After the passage of the resolution mentioned in section 5 hereof there shall be conspicuously posted in three of the most public places within the municipality, and also along the street frontages of all the real property within the district, at not more than one hundred feet in distance apart, notices of the hearing provided for in section 5; . . . . said notices must be posted at least twenty days before the time set for the hearing, and must be published twice in some newspaper of general circulation, published within the municipal corporation in which the improvements are to be made, at least ten days before the date of hearing." The only uncertainty in the foregoing is as to the meaning of the words "along the street frontages of all the real property within the district." If the word "frontage" is construed to mean the whole street in front of the property charged, the requirement is satisfied by one set of notices, not more than one hundred feet in distance apart measuring longitudinally. Such is the rule under the provision of the Vrooman Act requiring

notices to be posted along the line of the work.[23] I am inclined to think that this is the proper construction. However, the word "frontage" is capable of other meanings; and until the Supreme Court settles the matter, it is safer to post on both sides of the street in all cases where property on both sides is included within the district.

§ 529. **Same—Contents.**—The contents of the notices are also prescribed by section 6. "Said notices shall be headed, 'Notice of Local Improvement,' in letters of not less than one inch in length, and shall in legible characters state the fact of the passage of the resolution mentioned in section 5, and briefly describe the work of improvement proposed, and refer to said resolution for further particulars; said notice shall also state the date, hour and place for which the said hearing has been set, and shall notify all parties interested in any real estate within the limits of said district then and there to show cause, if any they have, why the said improvements proposed in said resolution should not be carried out in accordance therewith; said notice shall also contain a description of the district covered by the resolution by the exterior boundaries thereof, said description to be in bold face type." Of course the above provisions as to the size of the type apply to the posted notices only, and not to the published. Only a brief description of the work is necessary. In this respect the notice is similar to that required to be posted by section 3 of the Vrooman Act, and what has been said in regard to that applies here.[24] The posting and publication are essential to jurisdiction.[25] Hence the requirements as to contents should be strictly followed.

23 See ante, sec. 95.

24 See ante, sec. 94.

25 See Chase v. Trout, 146 Cal. 350, 80 Pac. 81, where it is said that some notice is necessary in order that there may be due process of law. This is the only notice provided prior to the levy of the assessment.

§ 530. **Same—Affidavit.**—The first part of section 7 provides for evidence of the posting and publication of notice. "At the time named in the notice hereinbefore provided for for said hearing there shall be filed with the legislative body an affidavit that the notice has been posted as hereinbefore provided for, and an affidavit of the printer or publisher of the newspaper in which said notice has been published that the same has been published as hereinbefore provided for, and the legislative body, before proceeding with said hearing, shall have entered upon the minutes of the meeting an order reciting that notice of said hearing has been posted and published according to law, and such recitals shall be conclusive evidence of the facts therein recited." In order that the matter may properly appear upon the minutes, it is necessary that the council pass a resolution or order reciting the facts. A mere recital in the minutes that the affidavits were filed is not sufficient.

§ 531. **Same—Same—Validity of the Provision.**—In my opinion, the provision above quoted making recitals in the minutes conclusive evidence of the posting and publication of notice is invalid. Speaking of the conclusive evidence clause of the Bond Act, the Supreme Court said: "The power of the legislature to declare any evidence conclusive against the right of an individual to controvert it in any action which involves the taking of his property has been extensively considered in cases involving taxation. It may be regarded as settled that the legislature may make a tax deed conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise—such as the

listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor—the legislature cannot deprive the owner of the right to show want of compliance."[1] In a later case it is said that the legislature may, by a curative act, correct an omission of an act which might have originally been dispensed with. By "jurisdictional" is meant such proceedings as are necessary to constitute a compliance with the mandates of the state or federal constitution.[2] In the same case the court said: "What, then, are the essentials the nonobservance of which cannot be cured? The property must be within the jurisdiction of the local board; there must be the actual performance of some work which is to be paid for—that is, a 'subject matter' of which the council can acquire jurisdiction; an assessment or apportionment of the amount to be raised must be made; and there must be sufficient notice and opportunity for the hearing and determination of grievances and objections to constitute due process of law." The only opportunity given by the statute whereby the owners may be heard as to the assessment is in response to the posted and published notice. Some notice is essential to constitute due process of law. An owner cannot be deprived of his right to be heard by any recital; and the legislature cannot authorize such a deprivation of right. Hence it seems clear to me that in so far as the section makes the evidence conclusive it is invalid. It has been held in Illinois, however, that a finding that due notice has been given cannot be collaterally attacked; and in the same case it was held that such a finding cannot be attacked in an action to collect the assessment.[3]

1 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

2 Chase v. Trout, 146 Cal. 350, 80 Pac. 81. The term "jurisdictional" is frequently used in regard to matters which affect only the right of the council to proceed under the statute. Here, however, it has the narrower meaning.

3 Clark v. Kern, 146 Ill. 348, 35 N. E. 60.

§ 532. **Objections and Hearing.**—Section 7 then provides for the hearing and for the form of objections. "The legislative body shall thereupon proceed with the hearing of any objections which shall have been made in writing and filed with the clerk of the municipality not later than the hour for hearing named in said notice, and no other objections shall be considered. Said hearing may be continued from time to time by the legislative body, and all parties interested shall be deemed to have notice of said continuances. All objections must be in writing, must contain a description of the property in which the objector is interested, and set forth the nature of his title thereto or interest therein, and must state the objector's grounds of opposition, and must be signed and verified by the objector himself, or his attorney in fact, and objections which do not comply with these requirements shall not be considered by the said legislative body." In general, provisions for the benefit of the owner are liberally construed in his favor.[4] It would seem that objections which substantially conform to these requirements should be considered. For instance, in the matter of description, the same certainty that is required for the assessment would surely not be required. The only purpose of it is to advise the legislative body what property is involved; and it would seem that a reference to the property by its number as shown on the map annexed to the report should be sufficient. As a practical matter, the legislative body should hear all objections filed, whether they conform to these requirements or not. No harm can be done thereby, for the legislative body has absolute power to decide. On the other hand, if the courts should disagree with the legislative body as to the sufficiency of the objection, and a hearing is denied, the proceedings would be invalidated.

[4] See ante, sec. 102, as to protests under the Vrooman Act.

§ 533. **Resolution Confirming Prior Resolution—The Lien.**—Section 8 provides: "At the close of the hearing provided for in the preceding section, the legislative body shall pass a resolution setting aside, modifying, or confirming the resolution provided for in section 5 hereof, and where the same is confirmed or modified, the lien of the assessment provided for therein shall immediately become attached to the respective parcels of land in accordance with said confirmed or modified resolution." This resolution corresponds to the resolution ordering the work under the Vrooman Act; but it amounts to a decision of an appeal as well. It would seem clear that the authority to modify the resolution does not authorize the legislative body to increase the assessment district; for that would subject property to assessment without giving the owners an opportunity to be heard. Section 22 declares the rank and duration of the lien. "All special assessments levied under this act shall, from the date of confirmation as provided in section 8 hereof, be a lien upon the real estate upon which they are imposed, paramount to all other liens, except prior assessments and general taxes, and such lien shall continue until such special assessments are paid; and all parties shall have constructive notice of such lien from the date of entry of the resolution referred to in section 8 above." The provision as to priority is the usual rule as to special assessments.[5] The statement that the lien shall continue until the assessment is paid is probably too broad. As we shall see, the tax collector must make sales for delinquent assessments within a specified time; and if he fails to do so, his power is exhausted. If the lien still continues, it is an unenforceable lien, which for most purposes is no lien at all.

§ 534. **Limitation for Action to Contest Assessment—In General.**—Section 9 provides: "Any action to contest an assessment levied by the legislative body of any municipality

[5] See ante, secs. 229–231.

under the terms of this act must be commenced within thirty days after the entry upon the minutes of such legislative body of the resolution provided for in the preceding section hereof; and any appeal from a final judgment in such an action must be perfected within thirty days after the entry of such judgment." This is intended as a statute of limitation. A similar provision has been inserted in the Code of Civil Procedure in the chapter dealing with the limitation of actions.[6] It is clearly within the power of the legislature to declare the period within which such actions must be commenced. The Supreme Court of Colorado, in passing upon a somewhat similar statute, held that it applied to constitutional objections.[7] In other words, a party claiming that notice has not been given must bring his action within the time prescribed. A more serious question arises as to what actions are affected by this provision.

§ 535. **Same—Effect of This Provision.**—The ordinary action to contest a street assessment is an equitable proceeding to set aside or enjoin the enforcement of the assessment upon the ground that it constitutes a cloud upon title. Such a suit may also be maintained in cases of fraud and where a multiplicity of suits will be avoided by the interposition of a court of equity.[8] It would seem clear that the section applies to all of such suits. But a suit is not authorized in all cases of void or illegal assessments. For instance, where the proceedings are void on their face, it is held that there is no cloud on title, and hence equity

[6] Code Civ. Proc., sec. 309.

[7] City of Denver v. Campbell, 33 Colo. 162, 80 Pac. 142. In this case the statute provided that "no action or proceeding shall be commenced to review any proceedings, or acts, or to question the validity, or enjoin the collection of the bonds . . . . unless commenced within ninety days after the passage of the ordinance making the final assessment."

[8] See ante, sec. 26 ff.

will not interfere.[9] An owner is certainly not remediless.[10] Hence it would seem that in such cases the owner can set up the invalidity of the proceedings, in a collateral proceeding or otherwise, whenever the validity of the assessment is the foundation of the right involved. For instance, where a purchaser at a delinquent sale sues for possession of the premises, the owner can certainly set up that the plaintiff has no title because the proceedings are void on their face. Moreover, I believe that an owner may, when the proceedings are void on their face, sue a purchaser to quiet title. Such a suit is not a contest of the assessment. In reality there is no assessment, but merely the form of one.[11] Practically all the serious defects in street work proceedings appear upon their face. Hence it would seem that the provisions of section 9 are not of great value. Again, in cases where the invalidity does not appear on the face of the proceedings, it is questionable whether the statute does more than restrict the right to commence an action. There is no provision that defects shall be cured by a failure to sue. The section deprives the owner of valuable rights, and it should not be extended beyond its clear meaning.

§ 536. Transmission of Map and List to Tax Collector—Time.—Section 10 provides: "After the expiration of thirty days from the passage of the resolution provided for in section 8 hereof, the clerk of the municipality shall transmit to the tax collector of the municipality the map and list provided for in subdivisions 5 and 6, respectively, of section 4 hereof, and any modification therein; provided, however, if any actions have been brought within thirty

[9] See ante, sec. 28.

[10] The section does not purport to extend the remedy. It applies only to remedies which the owner ordinarily has.

[11] Suppose, for instance, that the council should attempt to do unauthorized work, or should attempt to bind property beyond the city limits. Or suppose the proceedings showed that no notice had been given. There would be a form of assessment, but no real assessment in fact.

days after the passage of the resolution referred to in section 8, such transmission shall be postponed until such actions have been finally determined." It is the purpose of the statute that the assessment shall not be transmitted until the question of its validity has been determined. The words "finally determined" have the same legal effect as "final judgment." The Vrooman Act provides for a reassessment when an assessment is declared, by a final judgment, to be invalid because of some defect in the action of the superintendent of streets in making it. In passing upon this, the Supreme Court has held that a decision upon appeal by the Supreme Court ordering a new trial is not a final judgment, within the meaning of the statute.[12] It would seem to follow that the report cannot be transmitted until the time for appeal has elapsed, unless the right to appeal is abandoned, or, in the event that an appeal is taken, until the judgment of the trial court is sustained.

§ 537. **Record of Map and List.**—The first duty of the tax collector upon receipt of the map and list is to record them. Section 11 provides: "Upon the receipt of the map and list referred to in the last preceding section, the tax collector of the municipality shall record the same in a substantial book to be kept for that purpose in his office. Said book shall also be ruled with appropriate columns, in which the tax collector shall extend the amounts of all installments of principal and interest and deferred payments, and each of said columns shall be provided with a space in which he shall make record of the fact and date of all payments received by him; and there shall also be a column in which shall be entered a reference by volume and page to the respective agreements under which the said deferred payments are made." Under the Vrooman Act, it is held

12 See ante, sec. 247. In the case establishing this rule, it was held that where the contractor abandons his right of appeal and applies for a new assessment, the judgment is final in the sense in which the word is used in the statute.

that the record of the assessment is essential to the enforcement of the assessment.[13] It would seem probable that the same rule is applicable here. The matter of installment payments is provided for in section 13. Of course the tax collector cannot extend the amount of principal and interest until after the installment agreements have been given. The tax collector must record the map and list within ten days from the time he receives it; for section 12 requires the day for cash payments to be not more than forty nor less than thirty days after receipt.

§ 538. **Collection of Assessments.**—After recording the map and list, the tax collector must fix the last day for cash payments and the day of sale for delinquency. Section 12 provides: "The tax collector shall thereupon fix a day, not less than thirty nor more than forty days from the date of the receipt by him of the map and list transmitted to him under the provisions of section 10 hereof, which day shall be the last day for cash payments; and also shall fix a day for the sale of the various parcels of land within said district, which said day shall be not less than forty nor more than sixty days from the receipt by him of the map and list transmitted to him under the provisions of section 10 hereof." No penalty is provided for delinquency; and the owner may, either directly or by a roundabout process, pay the amount due until the day of sale. Section 13 authorizes a sale only of parcels on which the assessments have not been paid. If this does not authorize payment up to the day of sale, the owner may sign an agreement and under the terms thereof pay it in full the next day. It is true that in such event he is obliged to pay some interest.

§ 539. **Notice of Sale for Delinquency.**—Section 12 provides that notice of sale "shall be given in conformity with the general laws of the state of California providing for

[13] See ante, sec. 220 ff.

notice of sale of real estate upon execution, and shall be posted and published in the same manner as such notices; provided, however, that the descriptions of the various parcels need not be set out at length, but only by the respective numbers of the same, as the same appear upon the assessment and diagram, which shall be properly referred to in said notice; which shall be in one writing, containing all of said descriptions." In other words, there is to be but one notice for all the parcels. Section 692 of the Code of Civil Procedure provides for notice in case of real property, by posting a written notice of the time and place of sale "particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper of general circulation, printed or published in the city or township, in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county." The rules applicable to execution sales are familiar and need not be discussed here. In regard to the notice of sale, it is sufficient if it is posted for a sale on the twentieth day after the posting.[14]

§ 540. Installment Agreements and Waivers—Contents. Section 13 provides for an extension of the time of payment in cases where the owner files an agreement to pay in installments at or before the time set for the sale. This agreement must contain: (1) A stipulation "waiving all objections, of whatsoever kind or nature, against the assessment and all proceedings with reference to the same"; (2) A stipulation "undertaking to pay the assessment on his

[14] See Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111; Hagenmeyer v. Mendocino Co., 82 Cal. 214, 23 Pac. 14; Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

parcel in yearly installments not to exceed ten in number, the first of which shall be paid at the time said agreement is filed, and the others annually thereafter, one each year, at the time when the first installment of municipal taxes within said municipality is payable, with interest on all deferred payments at the rate of ——— per cent per annum, being the same rate fixed by the resolution provided for in section 5 above for deferred payments, payable at the same time as the installments of principal"; (3) A provision "to the effect that in case of default in payment of any installment of principal provided for therein, or interest accrued on deferred payments, at the time called for by said agreements, then, in that event, the entire remaining unpaid installments shall become immediately due and payable, and the tax collector shall then forthwith, upon twelve days' written notice mailed to the last known address of the party, sell the property covered by the delinquent payment to realize the entire unpaid balance of said installments, with accrued interest and costs of sale; provided, the same have not been paid before the expiration of said twelve days." It is possible that the legislature did not intend to make the last part of the sentence quoted a part of the agreement; but the sentence is so punctuated that it is not safe to omit any part of the provision. (4) A provision "that the entire unpaid balance may be paid at any time before maturity, together with interest on all deferred payments, until the date of maturity of the installment of principal next falling due." This is a very liberal provision, much more liberal than the rights given the owner under the Bond Act. The owner, by paying a day or two before an installment becomes due, may practically avoid all charge for the privilege of paying in advance.

§ 541. **Same—Duties of the Tax Collector.**—Section 13 makes it the duty of the tax collector to provide printed forms for the waivers and agreements. Upon receipt by

the tax collector, they are to be "bound in a substantial book and kept among the records of his office." He is also to "mark upon the record of the assessment, opposite the respective descriptions or numbers of such parcels, memoranda to the effect that time has been given." In other words, he is to complete the record provided for in section 11. The agreement does not provide for a lien upon the property; but under the provisions of section 22 the lien continues until the full amount of the assessment is paid. While the statute does not say so expressly, it is the evident intent that the lien shall cover both principal and interest.

§ 542. **Same—Validity of Provision for Waiver.**—The requirement that owners desiring to take advantage of the installment provisions sign a waiver does not invalidate section 13. The Supreme Court of Iowa, in passing upon a somewhat similar provision, said: "The precise contention is that the provision in the section which extends to those taxpayers who waive objections the privilege of paying in installments, and, on the other hand, as argued, imposes a penalty on one who neglects to waive, and prefers challenge as against the assessment, amounts to a denial of the equal protection of the law. This contention is without merit. The provision is that the assessment shall be levied at one time, and, when levied and certified, shall be payable at the office of the county treasurer. From there on the provision is for a privilege, not to one, but to all. There is nothing in the nature of a requirement. It would be absurd to say that one may be heard to complain that he is not given equal protection, when he is accorded the same privilege that is extended to all others. If he does not choose to accept, it is equivalent to an election on his part to pay in one sum upon his liability to pay being determined. State legislation does not deny the equal protec-

tion of the laws if all persons subject to it are treated alike under similar circumstances."[15]

§ 543. **Same—Effect of Waiver.**—The effect of the waiver contained in the agreement has not been considered by our courts; but it is probable that it will be held to waive all defects of every nature. The Supreme Court of the United States, in discussing waivers in street assessment matters, said: "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person."[16] And the Supreme Court of Indiana has said: "While we are satisfied that it would be within the power of the legislature to enact that one who had stood by while an improvement was being made, under color of statutory authority, until the work was substantially completed, and until his property had received the benefit of the money expended, should not thereafter question the assessment, we are not required to go to that extent in this case. . . . . Since, as we have seen, the law

[15] Sisson v. Buena Vista County, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440.

[16] Shepard v. Barron, 194 U. S. 553, 24 Sup. Ct. Rep. 737, 48 L. ed. 1115. In this case the court distinguished an earlier case in which it was held that parties petitioning for an improvement are entitled to a valid assessment. The court limited this rule to cases where the statute does not fix the assessment.

makes no provision whereby the bonds go out with any credit from the municipality issuing them, this feature of the law puts the securities or bonds beyond question, by giving them the absolute credit of the property upon which they are made a lien of the same degree as taxes are a lien, and removing all question as to the validity of the assessments. While, as we have said, we do not doubt the power of the legislature to incorporate into the statute the feature complained of, even without the agreement—for it is little else than the affirmative of a common-law principle—there is no room to question its validity, as applied to one who has signed the agreement provided for."[17] The cases cited seem sound, and are applicable to the present matter.

§ 544. **Sale for Delinquency—In General.**—If the owner neither pays the assessment nor files the agreement and waiver within the time fixed, the tax collector must proceed to sell the property. Section 13 provides: "At the time and place fixed for the sale of said property by the terms of the notice referred to in the last section, the tax collector shall sell the respective parcels of land within said district, the assessments against which have not been paid or bonded against as hereinafter provided, or so much of each parcel as shall be necessary to realize the amount assessed against such parcel and its proportion of the expenses of sale, in the order of their numbers upon the map provided for in subdivision 5 of section 4 hereof, at which sale the municipality may be a purchaser." In my opinion, if the municipality purchases, it must actually pay the purchase price into the fund, the same as any other purchaser. A contract is authorized by section 19 only after the funds to pay the price are in the treasury. The funds are not in the treasury unless they have either been set apart or are subject to appropriation. The general funds cannot be used to pay the cost

[17] Quill v. City of Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.

directly, unless the amount to be so paid is deducted from the total amount and only the balance assessed upon the property within the district.[18] The purpose of the sale is to obtain money for the work immediately. For this reason, the Supreme Court, in interpreting another act, held the tax provision for a sale to the state to be inconsistent with the scheme of a special assessment statute and inapplicable.[19] The present provision can be made consistent only by the suggested construction.

§ 545. **Same—Certificate.**—Upon receiving the purchase price, the tax collector must deliver to the purchaser a certificate of sale. Section 14 provides: "The tax collector shall issue for each sale an original and duplicate certificate of sale, referring to the proceedings, describing the parcels sold, and containing the name of the purchaser; the originals he shall deliver to the purchaser, and the duplicates he shall keep on file in his office in the form of stubs in a certificate book." In interpreting the provisions as to general taxation, the Supreme Court has held that the certificate must contain all the matters prescribed by the statute, and that a failure substantially to comply with the provision makes the certificate void.[20] The same rule is probably applicable here. It is to be noted that no time is prescribed for the delivery of the certificate; and, as we shall see, it is questionable whether the time it is made is material, so long as it is before the expiration of the year for redemption. The purchaser is not required to file or record his certificate. Apparently, it is useful to him only as evidence of his right.

§ 546. **Same—Redemption.**—Section 16 provides: "At any time before the expiration of the year above provided

18 Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.
19 Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.
20 See post, sec. 711.

for, in which redemption may be made, any property sold under the provisions of the preceding sections may be redeemed by the payment to the tax collector of the amount for which the property was sold, with an additional penalty of twenty-five per cent of the amount for which the same was sold; all redemption money shall be paid by the tax collector to the persons holding the respective original certificates of sale, upon their delivering up the same, and receipting for the amount received from the tax collector therefor." Section 15 provides for a deed if the property is not "redeemed within one year after the sale." In my opinion, this means one year from the day upon which the sale was actually held. If this is correct, the date of the delivery of the certificate is immaterial, providing it is delivered before the time for the delivery of a deed.

§ 547. **Same—Deed.**—Section 15 provides: "If the property sold as provided in the above proceedings be not redeemed within one year after the sale, the tax collector shall then issue to the party named in the original certificate, or his assignee, a deed of the property described in said certificate, which said deeds shall refer, in general terms, to the proceedings under which the same is issued, and shall contain a description of the property, following the description in the certificate; the grantee of such deed is, immediately upon receipt thereof, entitled to possession of the property described therein." Interpreting this in the same manner in which the somewhat similar provisions as to tax sales have been interpreted, it is essential that the deed contain the prescribed recitals.[21] The effect of the deed as evidence is not stated. Hence it would seem that one claiming under such a deed must prove compliance with the statutory requirements. As we have already stated, the provision of section 9 limiting the time within which an action may be brought to contest an assessment

[21] See post, sec. 717.

cannot deprive an owner of the right to set up defects which would not justify him in maintaining an action to contest the assessment.[22] It is to be noted that the purchaser is not required to give notice of application for a deed. He is entitled to it, without formality, upon expiration of the period for redemption.

§ 548. **Deposit of Funds With Treasurer.**—Section 17 requires the tax collector to turn over all funds to the city treasurer. "The said funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said municipality, who shall enter the same in a special fund designated by reference to the number of the proceeding, and shall be paid out only for purposes provided for in this act."

§ 549. **Bonds—Issuance.**—Section 18 provides for the issuance of bonds to cover amounts secured by agreements. "After all sales above provided for have been made, the tax collector shall report to the legislative body of the municipality, the amount of cash collections and the amount of installment agreements taken; at any time thereafter the legislative body may order bonds issued against the said special local improvement fund, in such denominations and on such terms, not to exceed ten years, and at such rate of interest, not to exceed seven per cent per annum, as they shall have designated in said proceedings, the aggregate of such bonds not to exceed the amount of installment agreements taken, as above set forth." It is to be noted that there is no requirement that the term of the bonds be the same as the term of the agreements. While the statute says that the bonds may be issued at any time, we shall see that no contract can be entered into

[22] See ante, sec. 535.

until the funds for the part to be done are in the treasury. Hence it is essential that bonds be issued and sold before a contract can be let for an amount exceeding the cash payments. The issuance of the bonds should be directed by a resolution of the legislative body. The resolution should, according to the better practice, recite the fact that a certain amount of installment agreements have been taken and state the denominations and terms of the bonds to be issued. It is well to state the form of the bond in full, in order to avoid any question.

§ 550. **Same—Form.**—The form of bond, which must be substantially followed, is set forth in section 18. It must provide that it shall be payable only from the street improvement fund involved, and that "neither the municipality nor any officer thereof shall be holden for payment otherwise of its principal or interest."[23] In case "default be made in the annual payment upon the principal, or in any payment of interest, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have all liens and agreements, which are security for said fund and are then enforceable, immediately enforced in payment thereof." The efficacy of this provision depends upon whether a sufficient amount is due upon delinquent agreements to satisfy the bond. Inasmuch as the denominations of the bonds need not correspond with the denominations of the agreements, it might easily happen that the bondholder would be obliged to wait for his money, or at least part of it. The form then provides that "the principal hereof may be paid, at the option of said municipality, at any time before maturity. Notice of such redemption must be published by the treasurer of said municipality once in some newspaper of general circulation, published in said municipality, or at the county seat of the county

[23] As to the effect of a similar provision required in contracts under the Vrooman Act, see ante, sec. 161.

in which the same is located, and, at the expiration of one month from said publication, interest on all principal sums covered by such notice shall cease." This is made necessary by the fact that the agreements contain a provision for payment before the dates upon which the installments are due. Without this provision, amounts might become due on the bonds which could not be paid, although the makers of the agreements had all paid.

§ 551. **Same—Execution.**—Section 18 provides: "Said bonds shall be signed by the presiding officer of the legislative body of the municipality and countersigned by the treasurer of said municipality, and the seal of the municipality shall be affixed thereto. Said coupons shall be signed by the treasurer of the municipality, and his signature thereto may be by lithograph." This is the manner in which municipal bonds are usually signed. The authorization for the signature of the coupons by lithograph is probably unnecessary, for it is a general rule that an official may adopt a stamped or lithographed signature as his own.

§ 552. **Same—Sale.**—Section 18 then provides for the sale of the bonds. Said bonds "shall then be sold at not less than par to the highest bidder, for cash in United States gold coin; the proceeds shall be paid into the said special local improvement fund in the treasurer's hands." Provisions for the sale of bonds must be followed, for otherwise there is not a valid delivery. The bonds are to be sold to the highest bidder. The board is not given any discretion to decide between bidders, but must sell to the highest.

§ 553. **The Contract—In General.**—Section 19 provides: "At any time after the funds for the work, or any part of the work, are actually in the hands of the treasurer, the legislative body may let the contract, or contracts, for

such work, or the respective parts thereof." In my opinion this must be construed to mean that no contract shall be let unless there is sufficient money in the local improvement fund available to pay the contract price. This seems to authorize the letting of contracts for portions of the work separately. If so, it differs radically from the Vrooman Act, under which it is held that separate contracts for a portion of the work cannot be let.[24]

§ 554. Nature of the Provisions for Contracts.—It is a debatable question whether the provisions for the letting of the contract and the performance of the work are in invitum. It may be argued that after the funds for the work are collected the further proceedings are not a charge upon the landowners, and that therefore such owners are not entitled to insist on the same strict compliance with the statute which is required in other proceedings. In other words, the same rules do not apply to the expenditure of public money that apply to the collection thereof. This is in accordance with the rules relating to the collection of money by general taxation and the expenditure thereof for the general purposes of government. On the other hand, it may be argued that the money is collected for a particular purpose, and can be expended only for that purpose and in the manner provided by the statute. Section 21 provides for refunding such portion of the amount as may prove not necessary for the improvement. It may be said that where the contract is not properly let, and no valid charge accrues, the owners are entitled under this section to the return of their money. It is certainly dangerous practice to assume that the strict rules applicable to proceedings in invitum will not be followed.

§ 555. Notice Calling for Bids.—Before a contract can be let, a notice calling for bids must be published "in

[24] See ante, sec. 136.

some newspaper of general circulation published within the municipality, for two insertions, a week apart; or if there be no such newspaper, then by such posting as the legislative body may provide." The legislative body must direct the publication of the notice calling for bids. The notice should contain a description of the work sufficient to enable the bidders to determine what will be required of them; but it would seem sufficient if the notice refers to the proceedings in such a way as to enable bidders to obtain the necessary information by examining them.[25] If a bond is to be required for maintenance, the notice should so declare. There is no requirement as to the time within which bids must be presented; and it is probable that they may be received up to the time the contract is let.[1] The effect of stating a time in the notice calling for bids has not been definitely settled.[2]

§ 556. **Bids.**—Bids must be in such form that the acceptance by the legislative body will constitute a contract —a preliminary contract to enter into the formal contract required by the statute. Hence, bids must be signed by the bidder.[3] "Every bid shall be accompanied by the certified check amounting to ten per cent of the bid, payable to the order of the presiding officer of the legislative body of the municipality, and the same shall be forfeited to the municipality in case the bidder depositing the same do not, within ten days after written notice that the contract has been awarded to him, enter into a contract with the municipality for the work." The contract must be let to the lowest responsible bidder. This gives the legislative body a wide discretion in determining who is a responsible bidder. The courts will not interfere with an

25 See ante, secs. 134, 135.
1 See ante, secs. 134, 135.
2 See ante, secs. 134, 135.
3 See ante, sec. 137.

award on the ground that it is not let to the lowest bidder.[4] While there is no provision that all bids may be rejected, I believe that this is implied by the provision as to the lowest "responsible bidder."

§ 557. **Undertaking to Secure Performance.**—With the formal contract, the contractor must file an undertaking "in such penal sum as the legislative body shall require, and with sureties satisfactory to said body," securing the faithful performance of the work. Until this is filed, the contractor is not entitled to the return of his certified check. There is no provision as to the formal execution of the contract. In the absence of such direction, the contract should be executed in the same manner as other municipal contracts.

§ 558. **Provisions of Contract.**—Section 19 provides: "The contract must provide that the work be done, and the work must be done, strictly in accordance with the plans and specifications provided for in section 4 of this act, as modified by the resolution provided for in section 5 of this act; the contract must contain provisions making it comply with the terms of all statutes of the state of California in force at the time of making the contract, with reference to employment, hours and wages of labor." This makes it imperative to observe the statute limiting the hours of labor on public work to eight and the statute requiring two dollars per day to be the minimum wage.[5] In addition, the contract should contain the usual covenants on the part of the city and the contractor. While there is no express requirement that it contain stipulations as to the other matters mentioned in section 19, it certainly is better practice to make the contract contain all the terms. Of course the provisions of the statute not ex-

[4] See ante, sec. 140.

[5] For a discussion of these statutes, see Part II, Chapter I, Division 2.

pressly required to be inserted in the contract are implied parts thereof although not inserted.

§ 559. **Regulations Governing the Work.**—Section 19 further provides that "the work must be done under the supervision of the superintendent of streets of the municipality, or such deputy or deputies as the legislative body shall appoint for the purpose." This must be given the same construction as the somewhat similar provision in the Vrooman Act. It does not authorize the delegation to the street superintendent of the right to determine what materials shall be used or what part of the street shall be improved.[6] The section also provides: "The work must be commenced and completed within such time as the legislative body shall prescribe." Under the Vrooman Act, it is held that the contractor cannot collect for his work unless he completes it within the time originally fixed or within a valid extension of that time.[7] If the proceedings under this section are construed to be in invitum, it would seem to follow that the same rule should apply here. The last sentence of the section relates to the procedure on abandonment of the work. "If the contractor abandon the work, or fail to proceed with the same as rapidly as required by his contract, the legislative body may relet the work and pay the cost of the same out of any funds due or to grow due the contractor, and also any expenses incidental to the reletting, and also hold him and his sureties responsible for the same upon his bond, and also for any damages resulting from such abandonment." It would seem that the contract must be relet in the same manner in which the original contract was let; for there is no provision for any other procedure.

§ 560. **Acceptance.**—The provisions of section 19 for acceptance of the work are quite different from those of

[6] See ante, sec. 85.
[7] See ante, sec. 167.

the Vrooman Act. Instead of providing for an acceptance by the street superintendent, with a right of appeal to the council by the owner, this act requires a hearing before the council in the first instance. "Whenever the contractor desires the work or part thereof to be accepted he must make written application to that effect to the legislative body of the municipality. Upon the filing of such application for acceptance, the clerk of the municipality shall give at least five days' notice by publication within the municipality or by posting, as the legislative body shall determine, that at a certain time to be named in said notice the legislative body of the municipality will hear and consider any objections to the acceptance of the work or part of the work for the acceptance of which said contractor has made such application, and only after such hearing shall any work be accepted." It is apparent from the foregoing that the legislative body must determine the manner of giving the notice before any notice can be given. The words "posting upon the premises affected" are indefinite. The intent, however, would seem to be to authorize the council to provide for posting along the line of improvement, in such reasonable manner as it might determine. The section continues: "If upon such hearing objections to the acceptance are made and held by the legislative body to be good, the legislative body must require the contractor to take such steps as will remove such objections, and in the event of his failure to do so within such time as the legislative body shall prescribe, the legislative body may relet such portion of the work and charge the contractor the cost thereof together with all expenses incident to said reletting, and retain the same out of any moneys due or to become due to him under the contract, and also hold him and his sureties responsible therefor upon his bond."

§ 561. **Reassessments.**—Section 20 provides: "In case the first assessment for any local improvement prove insufficient, a second may be made in the same manner as

nearly as may be, except that no protest shall be entertained upon subject matter already decided in the first hearing, and so on until sufficient money shall have been realized to pay for such local improvement." This is the usual provision for this type of statute. The deficiency will ordinarily appear before the contract is let. As we have already seen, the contract is not to be let until the funds are on hand to pay the cost. A deficiency may appear subsequently, due to the default of the contractor. It would seem to be necessary to refer the matter to the engineer to report on benefits, and thereafter to proceed in practically the same manner as is provided for the levy and collection of the original assessment. Of course, the desirability of the improvement and the extent of the district are settled by the first decision, and cannot be questioned in the proceedings for a supplemental assessment. If the second assessment is not sufficient to cover all deficiencies, it is probable that a third assessment may be levied.[8]

§ 562. **Refund of Excess in Assessments.**—Section 21 provides: "If at any time an assessment for a local improvement shall realize a larger sum than is necessary for such improvement, the excess shall be refunded upon warrant upon the treasurer, authorized by the legislative body, pro rata, to the parties by whom it was paid; and, in the case of installment assessments, shall be credited on the unpaid installments, beginning with the one due at the latest date." It would seem to be the absolute duty of the legislative body to return the surplus as soon as the work is fully completed and paid for. It is doubtful if the owners can enforce repayment before that time, for until completion it is impossible to determine definitely whether there will be a surplus. The provision as to installment assessments is such that it might be necessary to call in certain of the bonds in order

[8] See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

to make certain that the subsequent payments would cover all principal and interest.

§ 563. **Summary Procedure for Work Between Successive Crossings—Preliminary Resolution.**—Section 23 provides a summary procedure for completing the work between two successive street crossings in cases where the majority of the frontage between the crossings has already been improved. The first step in the proceedings is the passage of a resolution "ordering said work to be done, briefly describing the work and the property in front of which the work is to be done, and fixing a time when objections to the doing of said work will be heard by said legislative body, which said time shall be not less than two weeks nor more than thirty days from the date of the passage of the resolution." The words "ordering said work to be done," read in connection with the subsequent parts of the section, mean that the resolution shall order the owners to have the work done by private contract. It is, in effect, a permit to do the work by private contract.

§ 564. **Same—Notice.**—"At least ten days before the time named in said resolution for said hearing the clerk of the municipality shall mail a copy of said resolution to the person or persons to whom the property in front of which the said work is to be done is assessed upon the last preceding assessment-roll of such municipality, at their addresses if known, otherwise addressed to the care of the United States postoffice in the municipality, shall personally serve upon the person or persons in possession of the premises, if the same be occupied, and shall post a copy of the same in a conspicuous place upon the said premises, and the certificate of said clerk to the effect that said mailing, posting and service has been done shall be filed with the legislative body and entered upon their minutes, and said entry shall constitute conclusive evidence of the facts stated in said certifi-

cate." It is essential that some notice be given before a lien can be definitely fixed upon the land. The provision that the certificate shall be conclusive evidence is similar to the provision in section 7, which seems to be unconstitutional.[9] Inasmuch as the proceeding is in invitum, it is essential that the resolution be served in the manner prescribed.

§ 565. Same—Objections, Hearing, and Award of Contract.—There is no requirement that the objections be in writing, or that they may be made in any particular way. A hearing must be had at the time fixed, and not before.[10] "If there are no objections or if the legislative body overrule the same, the legislative body shall then pass a resolution ordering said work to be done." The first resolution also orders the work to be done. This second resolution amounts to a confirmation of the first. "If within ten days after the passage of the last named resolution satisfactory evidence be not produced to the legislative body that the said work is to be immediately done by private contract the legislative body may advertise for bids for such work by such publication or posting as they shall deem necessary and let the work to the lowest responsible bidder, and pay for the same out of the general fund or any other fund available for the purpose." This seems to require the owners to present the satisfactory evidence of their intentions, without any demand or notice by the legislative body. Before advertising for bids, the legislative body must determine how notice to bidders is to be given. The provision that the contract shall be let to the lowest responsible bidder gives the board a wide discretion in the letting of the contract.[11]

[9] See ante, sec. 531.
[10] See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.
[11] See ante, sec. 140 ff.

§ 566. **Same—Assessment.**—The weak part of this section is the provision for assessing the cost. "The entire cost of such work together with the expenses incidental to the proceedings therefor shall be charged against the property in front of which the same has been done; the clerk of the municipality shall immediately upon the completion and acceptance of the work file an itemized statement of said charge with the recorder of the county in which the municipality is located, and thereupon the said charge shall become a lien upon the property affected, which said lien shall relate back to the date of the passage of the original resolution first above mentioned and shall be continued upon such property until the same is paid in full with interest at seven per cent from the date of the record of such statement; and the municipality shall have power to enforce said lien by foreclosure suit and sell said property for the satisfaction thereof." In order to carry out the scheme of assessing the whole cost, it would be necessary to have a separate proceeding for each parcel to be charged; for there is no method prescribed for apportioning the incidental expenses. An early case held that a provision for the apportionment of the entire cost of work in front of each parcel upon that parcel violated the principle of uniformity;[12] but it is doubtful if this case is correct.

[12] People v. Lynch, 51 Cal. 15, 29 Am. Rep. 677.

CHAPTER V.

THE CHANGE OF GRADE ACT OF 1909.

§ 567. Scope of the act.
§ 568. Vrooman Act not affected.
§ 569. Power to change grade more than once not affected.
§ 570. Nature of the proceeding—Construction.
§ 571. Resolution of intention.
§ 572. Description of the grade.
§ 573. Publication and posting of resolution.
§ 574. The street superintendent's notice.
§ 575. Protests—Who may make.
§ 576. Same—Contents.
§ 577. Same—Effect of majority protest.
§ 578. Same—Same—Exceptions.
§ 579. Same—What is a majority protest.
§ 580. Same—Procedure where protest is not a bar.
§ 581. Ordinance or resolution ordering change of grade.
§ 582. Proof of publication and posting.

§ 567. **Scope of the Act.**—In 1909 the legislature passed an act entitled "An act to provide for changing or modifying the grade of public streets, lanes, alleys, courts, or other places, within municipalities." The scope of this act is stated in the first section, which reads as follows: "The city council of any city is hereby empowered to change or modify the grade of public streets, lanes, alleys, courts, or other places therein, in the manner hereinafter provided." A peculiarity of this act is that it authorizes only the change of the paper grade, and does not provide for the actual work. It applies only to the change of grade and does not authorize the original establishment of a grade.[1] Unlike most of the other acts, it does not provide for an assessment nor for the payment of damages. The theory of the act is that the damage is caused, not by the change in the paper grade but by the actual doing of the work. At the same

[1] See German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. This case interprets the Vrooman Act, but the principle is the same.

session the legislature passed the Street Improvement Act of 1909, which makes provision for damages in cases where the actual change of grade works a detriment. These two acts must be considered together.

§ 568. **Vrooman Act not Affected.**—As we have already seen, the Vrooman Act provides both for the change of grade and for the actual performance of the work. The main distinctions between the two acts are that the present act does not provide for doing the work, nor for an assessment, nor for compensation. This act does not affect the operation of the Vrooman Act; "but is intended to and does provide an alternate system of proceedings for changing or modifying the grades of public streets, lanes, alleys, courts, or other places in municipalities; and it shall be within the discretion of the city council of any municipality to proceed in making any such change or modification of grade, either under the provisions of this act, or under the provisions of said acts hereinbefore mentioned, or amendments thereto; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereto as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts, or in any acts in conflict with the provisions hereof, shall be void and of no effect as to the proceedings commenced under the provisions of this act. The election of the city council to proceed under the provisions of this act shall be expressed in its ordinance of intention to order any change or modification of grade. The provisions of this act shall be liberally construed to promote the objects thereof. This act may be designated and referred to as the 'Change of Grade Act of 1909.' "[2]

§ 569. **Power to Change Grade More Than Once not Affected.**—This act is not to be construed as in any way

[2] See sec. 7.

limiting the right to change grades more than once. Section 5 provides: "If the grade of any public street, lane, alley, court, or other place, or portion thereof, has been heretofore, or shall be hereafter changed or modified, nothing in this act contained shall be construed to prevent any subsequent change or changes, modification or modifications of grade of any such public street, lane, alley, court or other place, or portion thereof."

§ 570. **Nature of the Proceeding—Construction.**—Inasmuch as this act does not provide for an assessment, and therefore does not impose a burden upon the property against his will, it would seem that it should not be given the same literal construction which applies to tax and assessment proceedings. Section 7 provides that "the provisions of this act shall be liberally construed to promote the objects thereof." While the assessment acts contain similar provisions, it would seem that this provision should be given greater effect than the others.

§ 571. **Resolution of Intention.**—The first step in the proceedings is the adoption of a resolution or ordinance of intention. Section 2 provides: "Before any change or modification of grade is ordered, the city council shall pass an ordinance or resolution of intention to order such change or modification of grade. Said ordinance or resolution of intention shall state the name of, or otherwise designate the public street, lane, alley, court or other place the grade of which, or any portion thereof, is proposed to be changed or modified, and shall set forth the change or modification of grade proposed to be made. One or more public streets, alleys, lanes, courts, or other places, or portions thereof may be included in the same ordinance or resolution of intention." This statute is express as to the requirements of the resolution. It should specify the portion of the street upon which the grade is to be changed. By the terms of section

7, it should also express an election to proceed under this act. It should designate the newspaper in which the resolution and the notice of the passage thereof must be published, although this may be done by a separate resolution.[3] The resolution of intention provided for by section 3 of the Vrooman Act is a model after which the similar resolutions of the other acts are more or less closely copied.[4]

§ 572. **Description of the Grade.**—The question of the sufficiency of the description of a grade has been considered in several cases. It is sufficient if it fixes the grade at each end of a block. By connecting these points by a straight line, the grade at any particular point can be ascertained.[5] It is not sufficient, however, if it merely fixes two points more than a block apart, without in some way designating the grade at points between.[6]

§ 573. **Publication and Posting of Resolution.**—Upon the passage of the ordinance or resolution of intention, it must "be posted conspicuously for two days on or near the chamber door of said city council, and published by two insertions in a daily or weekly newspaper published and circulated in said city, and designated by said council for that purpose. If no such newspaper is published and circulated in said city, such ordinance or resolution of intention shall be posted for two days on or near the council chamber door, and in two other public places in said city." Prior to publication, the newspaper in which the publication is to be made should be designated.[7] The entire resolution should be both posted and published. It is not necessary, however,

[3] See ante, sec. 90.

[4] The resolution of intention under the Vrooman Act is fully discussed ante, sec. 64 ff. Much of what is there said is clearly applicable here, and need not be repeated.

[5] Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467.

[6] Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537.

[7] See King v. Lamb, 117 Cal. 401, 49 Pac. 561.

that the resolution as posted and published contain a statement of the yeas and nays by which it was adopted, unless the city charter so requires.[8] Neither is it necessary to state the date of the passage of the resolution.[9] It is essential that the resolution be published for the time prescribed.[10]

§ 574. **The Street Superintendent's Notice.**—The next steps in the proceedings are the posting and publishing of the notice of the passage of the resolution by the street superintendent. Section 2 provides: "The street superintendent shall thereupon cause to be conspicuously posted along all public streets, lanes, alleys, courts, or other places, or portions thereof designated in the said ordinance or resolution of intention, where such change or modification of grade is proposed to be made, at not more than one hundred feet in distance apart, notices, but not less than three in all, of the passage of said ordinance or resolution of intention. Said notice shall be headed 'Notice of Change of Grade,' in letters of not less than one inch in length, and shall in legible characters state the fact of the passage of the said ordinance or resolution of intention, its date, the name or other designation of the public street, lane, alley, court, or other place, or portion thereof, the grade of which is proposed to be changed or modified, and shall refer to the ordinance or resolution of intention for further particulars. He shall also cause a notice similar in substance to be published for six days in a daily newspaper published and circulated in said city, and designated by said city council for that purpose, or in cities where there is no daily newspaper, by two insertions in a weekly newspaper so published, circulated and designated. In case there is no daily or weekly newspaper published in said city, said notice shall

[8] See King v. Lamb, 117 Cal. 401, 49 Pac. 561.
[9] See Vincent v. City of Pacific Grove, 102 Cal. 405, 136 Pac. 773.
[10] See Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

be posted for six days on or near the chamber door of said council, and in two other public places in said city."[11] Prior to publication, the newspaper in which the notice is to be published must be designated by the council.[12] The notices should not be posted or published by the superintendent of streets until after the expiration of the period for posting and publishing notice of intention.[13] A full and accurate description of the change of grade need not be contained in the notice. A brief description of the work, together with a reference to the resolution of the council, is sufficient.[14] The notices are to be posted along the street at not more than one hundred feet in distance apart. The entire street is the line referred to. The distance is measured longitudinally along the street.[15]

§ 575. **Protests—Who may Make.**—Section 3 provides: "Any person or persons owning any real property fronting upon any public street, lane, alley, court or other place, or portion thereof, where such change or modification of grade is proposed to be made, may, within thirty days after the first publication of the notice of the passage of the ordinance or resolution of intention, or within thirty days after the first posting thereof, where no publication thereof is made, as hereinbefore provided, file a written protest with the clerk of the city council against such proposed change or modification of grade." This must be read in connection with section 5, which states more particularly who may file objections. That section provides: "Except as otherwise hereinafter provided the person owning the fee, or the person in whom on the day any protest or petition is filed the legal title to real property appears, by deeds duly recorded in the county recorder's office of the

11 See ante, sec. 92 ff.
12 See ante, sec. 90.
13 See ante, sec. 93.
14 See ante, sec. 94.
15 See ante, sec. 95.

county in which said city is situated, shall be deemed to be the owner thereof for the purposes of this act; provided, however, that any person in possession of real property as the executor, administrator, trustee, guardian, or other legal representative of the owner, or any person in possession of real property under written contract of purchase duly recorded, shall be deemed to be the owner thereof for the purposes of this act. In the case of property held by tenancy in common, if any cotenant sign a protest under this act, only the proportionate share of the frontage thereof represented by his interest therein shall be counted in determining the amount of frontage represented by such protest. In the event that the change or modification of grade proposed by the ordinance or resolution of intention is only on one side of any public street, lane, alley, court, or other place, or portion thereof, only the owners of the real property fronting on the side of such public street, lane, alley, court, or other place, or portion thereof where such change or modification of grade is proposed to be made, shall be entitled to make or file a protest under the provisions of this act."[16] The protest must be filed within the time fixed.

§ 576. **Same—Contents.**—Section 3 further provides for the contents of the protest as follows: "Every such protest must contain a description of the property owned by each signer thereof, sufficient to identify the same, and if signed by more than one person, must be accompanied by the affidavit of one of the signers that each signature thereto is the genuine signature of the person whose name purports to be thereto subscribed; and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements shall not be considered by said city council."

[16] For a discussion of protests under the Vrooman Act, see ante, sec. 99 ff.

It is to be noted that it is not necessary for the protest to state any reason why the improvement should not be made. If it is signed by the owners of a majority of the frontage, it is, as we shall see, generally a bar to further proceedings. In other cases, however, a hearing is required, at which the cause or nature of the objections must be stated. In general, protests are to be liberally construed in favor of the protestants.[17] The section further provides: "The clerk of the city council shall indorse on every such protest the date of its reception by him." A failure to do this does not affect the validity of the protest.[18]

§ 577. **Same—Effect of Majority Protest.**—In general a majority protest is a bar to further proceedings for the same change of grade for a period of six months. Section 2 provides that at the next regular meeting after the expiration of the time for filing protests, the clerk shall present to said city council all protests so filed with him. "If the city council finds that such protests are signed by the owners of a majority of the frontage of the property fronting on the public street, lane, alley, court, or other place, or portion thereof where such change or modification of grade is proposed to be made, all further proceedings under said ordinance or resolution of intention shall be stayed and barred for six months from and after the filing of such majority protests, except as hereinafter provided, unless the owners of a majority of such frontage shall in the meantime petition the same change or modification of grade to be made; but a new ordinance or resolution of intention to make a different change or modification of grade of such public street, lane, alley, court, or portion thereof, may be passed at any time." It is to be noted that this provides for a bar when the council finds that the petition is signed by a majority. This would seem to imply authority to determine that fact; and would

[17] See ante, sec. 102.
[18] See ante, sec. 103.

seem to make that determination conclusive.[19] When the council finds that the protest is a bar, it loses all jurisdiction for six months to proceed with the same change of grade. Upon the analogy of the cases interpreting the Vrooman Act, it would seem that where the proceedings are once barred, they cannot be continued even after the lapse of the six months' period. New proceedings must be commenced.[20]

§ 578. **Same—Same—Exceptions.**—To the general proposition that a majority protest is a bar, the statute makes two exceptions. (1) It is not a bar "if the proposed change or modification of grade extends for a distance of not more than one block, and the grade of such public street, lane, alley, court, or other place, for at least one block thereof immediately adjacent to such block where such change or modification of grade is proposed to be made, on each side thereof, has already been established." (2) It is not a bar "if the proposed change or modification of grade extends for a distance of not more than one block at the end of a public street, lane, alley, court or place, and the grade thereof for at least one block thereof immediately adjacent to such block has already been established." It seems to me that these must be interpreted as applying only to cases where the grade of the part to be changed is to be changed to conform to the grade of the adjacent blocks. Under somewhat similar provisions of section 3 of the Vrooman Act, it is held that the improvement to be made must be of the same nature as that of the adjacent blocks.[21] The purpose of the exceptions seems to be to enable the council to complete work partially done.

§ 579. **Same—What is a Majority Protest.**—Section 3 provides: "In the event that the ordinance or resolution of

[19] See ante, sec. 364, as to conclusiveness of council's decision as to sufficiency of petitions.

[20] See ante, sec. 105.

[21] See ante, sec. 108.

intention designates any public street, lane, alley, court or other place, or portion thereof, the grade of which is proposed to be changed or modified, and there be included in said ordinance or resolution of intention any other public street, lane, alley, court or other place, or portion thereof, intersecting therewith or terminating therein, the grade of which is also proposed to be changed or modified, the change or modification of grade of such public street, lane, alley, court or other place, and of such other public street, lane, alley, court or other place or portion thereof, so intersecting or terminating, shall not be stayed or barred by any protests, made and filed as hereinbefore provided, unless such protest be signed by the owners of a majority of the total frontage of the property fronting on all such public streets, lanes, alleys, courts or other places, or portions thereof, where such change or modification of grade is proposed to be made." In other words, where two streets are included in the proceeding, and they intersect, or one terminates in the other, the protest, to be a bar, must be signed by the owners of a majority of the frontage on both streets. Under the general provisions of the Vrooman Act, it is held that where two streets are included in one proceeding, the work may be stopped on one street by a majority protest on that street.[22] The apparent purpose of the present provision is to establish a different rule where the streets intersect, or one terminates in the other. Where the streets do not intersect, and one does not terminate in the other, it would seem that the change of grade on one street may be barred by a majority protest of the owners on that street.

§ 580. Same—Procedure Where Protest is not a Bar.—Section 3 provides that if the protests are not signed by a majority, and that if the protests are not a bar because of the exceptions, "the city council shall thereupon fix a time for hearing such protests not less than ten days after the

[22] See ante, sec. 111.

meeting of the council at which such time is so fixed, and shall cause notice of the time and place of hearing to be published for two days in a daily newspaper published and circulated in said city, or by one insertion in a weekly newspaper so published and circulated; and if no daily or weekly newspaper be published and circulated in said city, then said notice shall be posted for two days on or near the council chamber door, and in two other public places in said city; and such publication or posting shall be completed at least five days before such hearing. The city council shall hear said protests at the time and place appointed, or at any time to which the hearing thereof may be continued, and pass upon the same, and its decision thereon shall be final and conclusive. If such protests are sustained, no further proceedings shall be had under said ordinance or resolution of intention, but a new ordinance or resolution of intention to make the same, or a different change or modification of grade may be passed at any time. If such protests are denied, the proceedings shall continue as if such protests had not been filed." The hearing must not be held nor continued prior to the time fixed.[23] The decision of the council is final only as to matters which it has jurisdiction to correct. Its decision does not cure jurisdictional defects.[24] After once sustaining a protest, the council cannot reconsider its action.[25] The proceeding is then at an end, and the change can be made only by the commencement of a new proceeding.

§ 581. **Ordinance or Resolution Ordering Change of Grade.**—Section 4 provides: "If no protests are filed within the time hereinbefore provided, or if protests are filed, and after hearing are denied, as hereinbefore provided, the city council shall acquire jurisdiction to order the change or

[23] See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.
[24] See ante, sec. 263.
[25] See ante, sec. 262.

modification of grade described in the ordinance or resolution of intention to be made. Having acquired such jurisdiction, the city council shall by ordinance or resolution, order the change or modification of grade to be made as proposed by and described in the ordinance or resolution of intention. Said ordinance or resolution ordering the change or modification of grade shall be published by two insertions in a daily, or by one insertion in a weekly newspaper published and circulated in said city; or if no such newspaper be published and circulated therein, the same shall be posted for two days on or near the council chamber door, and in two other public places in said city." This, in terms, limits the jurisdiction to the same work described in the resolution of intention.[1] The effect of the ordinance is to make the new grade the official grade. Any work thereafter done upon the street must be done to the new grade.

§ 582. **Proof of Publication and Posting.**—Section 5a provides: "Proof of publication of any notice required by this act shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting."

[1] See ante, sec. 131.

CHAPTER VI.

THE STREET IMPROVEMENT ACT OF 1909.

§ 583. Scope of the act.
§ 584. Particular improvements authorized.
§ 585. Other acts not affected.
§ 586. Outline of the procedure.
§ 587. Ordinance or resolution of intention.
§ 588. Posting and publication of resolution.
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§ 598. Same—Form of—Necessity for filing.
§ 599. Same—Hearing and determination.
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§ 601. Same—Notice calling for bids.
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§ 604. Same—Contents.
§ 605. Procedure for acceptance of work.
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§ 608. The commissioner's report—Contents.
§ 609. Same—Notice of filing.
§ 610. Same—Objections—Hearing and determination.
§ 611. Recording assessment-roll—Lien.
§ 612. Notice that assessment is due.
§ 613. Payment of assessment.
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§ 620. Effect of deed as evidence.
§ 621. Disposition of funds collected.
§ 622. Notice to contractor and notice of payment of damages.

§ 623. Procedure where owners refuse to accept damages awarded.
§ 624. Supplemental assessment.
§ 625. Proof of posting and publication.

§ 583. **Scope of the Act.**—In 1909 the legislature passed the act known as the "Street Improvement Act of 1909." Its scope is stated in the first section. "Whenever the public interest or convenience may require, the legislative body of any city, after having by ordinance or resolution established or changed or modified the grade of any public street, lane, alley, court or place in said city, or any portion thereof, is hereby empowered, in any case where, in the opinion of said legislative body any damage to private property would result from the improvement thereof, to order the whole, or any part thereof, either in length or width," to be improved in the particulars therein stated. This act must be considered with the Change of Grade Act of 1909,[1] which it supplements. It is limited to cases where damage may result; but it is not limited to cases of the change of grade. We have already seen that the Change of Grade Act of 1909 is limited to the change of an established grade.[2] The present act, however, applies both in such a case and in case of damage caused upon the original establishment of a grade. The necessity for such an act arises from the constitutional provision that property shall not be damaged for public use without compensation.[3] To some extent, this act prescribes an alternate procedure to the change of grade provisions of the Vrooman Act.

§ 584. **Particular Improvements Authorized.**—The particular improvements authorized by this act are much the same as those authorized by the Vrooman Act. Section 1 authorizes the legislative body to cause streets "to be improved to conform to such official grade by grading or regrading, paving or repaving, planking or replanking,

1 See ante, secs. 567–582.
2 See ante, sec. 567.
3 See ante, secs. 5, 62.

macadamizing or remacadamizing, piling or repiling, capping or recapping, graveling or regraveling, oiling or reoiling, sewering or resewering, sidewalking or residewalking, curbing or recurbing, or guttering or reguttering, or by the building of storm water ditches or channels or breakwaters, levees, walls of rock or of other material to protect the same from overflow or injury, or by constructing manholes, culverts, bridges, cesspools, tunnels or cross-walks, or by the doing of any other work which shall be necessary to complete the whole or any portion of said public street, lane, alley, court or place, under the proceedings hereinbefore provided, and in accordance with plans and specifications prepared by the city engineer of said city, and approved by the legislative body thereof."

§ 585. **Other Acts not Affected.**—This act is intended to prescribe a different procedure, but not to repeal any of the other acts. Section 23 expressly provides that it shall not affect the Vrooman Act, the Bond Act, and the Local Improvement Act of 1901, "but is intended to and does provide an alternate system for making the improvements provided for by this act; and it shall be in the discretion of the legislative body of any city to proceed, in making said improvements, under the provisions either of this act or of such other acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict herewith shall be void and of no effect as to the proceedings commenced under this act."

§ 586. **Outline of the Procedure.**—In outline, the procedure under this act is as follows: (1) The legislature must pass a resolution or ordinance of intention, which must specify a day for hearing protests. (2) The resolution must

be posted and published by the clerk. (3) Thereafter notice must be posted and published by the superintendent of streets. (4) Protests may be filed, and a hearing must be had thereon. Majority protests are, in general, a bar. (5) After decision upon the protests, the council must pass a resolution or ordinance ordering the work, and referring the same to certain officials as commissioners to assess benefits and damages. This resolution must be published. (6) The commission must give a hearing, after notice, to persons claiming damage. Persons failing to file claims are deemed to have waived them. (7) Meanwhile, the council lets the contract, after notice calling for bids. (8) The commissioners must report, a hearing must be had on any objections filed, after notice, and the council may confirm, modify or correct the report. (9) Upon confirmation the report becomes the assessment-roll. Assessments are collected by the tax collector. Property upon which the assessments become delinquent is sold. (10) When sufficient funds are on hand, claimants who have been awarded damages must be notified that they may receive the amounts upon executing a release, and the contractor must be notified to commence work. (11) If such owners refuse to accept the amount, a condemnation suit may be commenced. (12) If the first assessment does not yield sufficient to pay the expense of the work, a second assessment may be levied.

§ 587. **Ordinance or Resolution of Intention.**—The first step in the proceedings is the passage of an ordinance or resolution of intention. Section 2 provides: "Before ordering any improvement described in section 1 hereof, the said legislative body shall pass an ordinance or resolution declaring its intention so to do, and that in its opinion damage to private property would result from such improvement, describing the proposed improvement, fixing a time and place for the hearing of protests in relation thereto by said legislative body, which time shall be not less than twenty

nor more than thirty days from the date of the passage of said ordinance or resolution of intention, and specifying the exterior boundaries of the district of land to be benefited by said improvement and to be specially assessed to pay the costs and expenses thereof, and the damages caused by said improvement, which shall be known as the assessment district. Said legislative body may include in one improvement the whole or any portion of one or more streets, lanes, alleys, courts or other public places, and any or all of the different kinds of work mentioned in section 1 hereof, and may exclude therefrom any of said work already done to the official grade." This provision is more precise than the corresponding sections of most of the other acts. The resolution of intention, in practically all of the acts, is a necessary jurisdictional step, and unless the statutory requirements are followed, the legislative body acquires no jurisdiction to order the work.[4] What has been said as to the description of the improvement under the resolution of intention under the Vrooman Act applies equally here.[5] Likewise, what has been said as to the description of the assessment district under that act also applies.[6] Thus, it is necessary to specify the exterior boundaries of the district. It is not sufficient merely to state that property fronting on certain streets shall constitute the district. The authorization to include several streets in one proceeding will probably be interpreted as not authorizing the including of streets in widely separated portions of the city.[7] In addition to the matters expressly required to be stated in the resolution of intention, it should also designate the newspaper in which the resolution and notices must be published.

4 See ante, sec. 64 ff.

5 See ante, sec. 69 ff.

6 See ante, secs. 86–88.

7 See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610. As to the rule under the Vrooman Act, see ante, sec. 68.

§ 588. **Posting and Publication of Resolution.**—Section 3 requires the posting and publication of the resolution in much the same manner as is required by the Vrooman Act. "Said ordinance or resolution of intention shall be conspicuously posted for two days on or near the chamber door of said legislative body, and published by two insertions in a daily or weekly newspaper published and circulated in said city, and designated by said legislative body for said purpose." What has been said as to the corresponding posting and publication under the Vrooman Act applies here.[8] The newspaper must be designated by the legislative body before the publication is made.[9] The section provides that "if no such newspaper be so published and circulated in said city, such posting of said ordinance or resolution of intention shall be sufficient." The last sentence of the section provides that "such posting and publication must be completed at least fifteen days before the day set for the hearing of protests." Inasmuch as this applies particularly to the street superintendent's notices, it follows that the clerk must complete his publication and posting in time to allow the street superintendent to complete his posting and publication in time. This section requires at least seven days' publication, and the maximum time allowed by section 2 for the hearing of protests is thirty days after the passage of the resolution. It is apparent that both the street superintendent and the clerk must act promptly. It is to be noted that in cases where the publications must be made in a weekly newspaper, it is absolutely impossible to complete the publications within the time allowed.

§ 589. **The Street Superintendent's Notice.**—The provision for the street superintendent's notice is also similar to that required by the Vrooman Act.[10] Section 3 provides:

[8] See ante, secs. 89–97.
[9] See ante, sec. 90.
[10] See ante, secs. 92–96.

nor more than thirty days from the date of the passage of said ordinance or resolution of intention, and specifying the exterior boundaries of the district of land to be benefited by said improvement and to be specially assessed to pay the costs and expenses thereof, and the damages caused by said improvement, which shall be known as the assessment district. Said legislative body may include in one improvement the whole or any portion of one or more streets, lanes, alleys, courts or other public places, and any or all of the different kinds of work mentioned in section 1 hereof, and may exclude therefrom any of said work already done to the official grade." This provision is more precise than the corresponding sections of most of the other acts. The resolution of intention, in practically all of the acts, is a necessary jurisdictional step, and unless the statutory requirements are followed, the legislative body acquires no jurisdiction to order the work.[4] What has been said as to the description of the improvement under the resolution of intention under the Vrooman Act applies equally here.[5] Likewise, what has been said as to the description of the assessment district under that act also applies.[6] Thus, it is necessary to specify the exterior boundaries of the district. It is not sufficient merely to state that property fronting on certain streets shall constitute the district. The authorization to include several streets in one proceeding will probably be interpreted as not authorizing the including of streets in widely separated portions of the city.[7] In addition to the matters expressly required to be stated in the resolution of intention, it should also designate the newspaper in which the resolution and notices must be published.

[4] See ante, sec. 64 ff.

[5] See ante, sec. 69 ff.

[6] See ante, secs. 86–88.

[7] See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610. As to the rule under the Vrooman Act, see ante, sec. 68.

§ 588. **Posting and Publication of Resolution.**—Section 3 requires the posting and publication of the resolution in much the same manner as is required by the Vrooman Act. "Said ordinance or resolution of intention shall be conspicuously posted for two days on or near the chamber door of said legislative body, and published by two insertions in a daily or weekly newspaper published and circulated in said city, and designated by said legislative body for said purpose." What has been said as to the corresponding posting and publication under the Vrooman Act applies here.[8] The newspaper must be designated by the legislative body before the publication is made.[9] The section provides that "if no such newspaper be so published and circulated in said city, such posting of said ordinance or resolution of intention shall be sufficient." The last sentence of the section provides that "such posting and publication must be completed at least fifteen days before the day set for the hearing of protests." Inasmuch as this applies particularly to the street superintendent's notices, it follows that the clerk must complete his publication and posting in time to allow the street superintendent to complete his posting and publication in time. This section requires at least seven days' publication, and the maximum time allowed by section 2 for the hearing of protests is thirty days after the passage of the resolution. It is apparent that both the street superintendent and the clerk must act promptly. It is to be noted that in cases where the publications must be made in a weekly newspaper, it is absolutely impossible to complete the publications within the time allowed.

§ 589. **The Street Superintendent's Notice.**—The provision for the street superintendent's notice is also similar to that required by the Vrooman Act.[10] Section 3 provides:

[8] See ante, secs. 89–97.
[9] See ante, sec. 90.
[10] See ante, secs. 92–96.

"The superintendent of streets shall thereupon cause to be conspicuously posted along all streets and parts of streets within the assessment district described in the ordinance or resolution of intention, not more than one hundred feet apart, notices (not less than three in all) of the passage of said ordinance or resolution. Said notices shall be headed 'Notice of Street Work' in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said ordinance or resolution of intention and the time and place fixed for the hearing of protests, and notify all persons interested to appear at said time and place with their objections to said improvement, if any they have, and briefly describe the proposed improvement, and refer to the ordinance or resolution of intention for further particulars. He shall also cause a notice of similar substance to be published for a period of five days in a daily newspaper published and circulated in said city, or if there is no such daily newspaper, then by two successive insertions in a weekly newspaper so published and circulated. If no such newspaper be so published and circulated in said city, such notice shall be also posted on or near the chamber door of the legislative body of said city, and in two other public places in said city. Such posting and publication must be completed at least fifteen days before the day set for the hearing of protests." Publication must not commence until the completion of the period of the publication by the clerk.[11] The notice is required to be fuller than the corresponding notice under the Vrooman Act; although it would seem that no fuller description of the work is required.[12] The posting must be along all streets and parts of streets within the assessment district, and not merely along the line of the improvement. The distance between the notices must be measured longi-

[11] See ante, sec. 93.

[12] See ante, sec. 94.

tudinally along the streets.[13] We have discussed the requirement as to the time of posting and publication in the preceding section.

§ 590. **Evidence of Posting and Publication.**—Section 4 provides: "Before the hearing of any protests there shall be filed with such legislative body affidavits showing that the said notices have been posted and published as hereinbefore required, and the said legislative body shall thereupon cause to be entered in its minutes an order reciting that notice of said hearing has been posted and published as required by law, and such order shall be prima facie evidence of the truth of the facts therein recited."

§ 591. **Protests—In General.**—Section 4 provides for three classes of protests: (1) A majority protest against the improvement; (2) a protest against the improvement signed by less than a majority; and (3) a protest to the extent of the district. The section provides: "At or before the time fixed for the hearing, any person interested, objecting to the proposed improvement or to the extent of the assessment district described in the ordinance or resolution of intention, may file a written protest with the clerk of said legislative body. Every protest must contain a description of the property in which each signer thereof is interested and set forth the nature of his interest therein, and must be accompanied by the affidavit of one of the signers thereof that each signature thereto is the genuine signature of the person whose name is thereto subscribed, and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements shall not be considered by said legislative body. The clerk shall indorse on every such protest the date of its reception by him, and at the time

[13] See ante, sec. 95.

fixed for the hearing, or at any other time, to which the hearing may be adjourned, he shall present to said legislative body all protests so filed with him." It is a general rule that protests are to be liberally construed in favor of the protestants.[14] As the statute is express in requiring a certain form, however, it would seem that all protests must at least substantially conform to the requirements stated. The requirement that the clerk shall make an indorsement upon the protest is not one which the protestants must see fulfilled. A failure to make the indorsement does not affect the validity of the protest.[15] The hearing must be held at the time fixed. A hearing prematurely held is of no avail.[16] It is probable that if the legislative body does not meet at the time fixed and either hear the protests or postpone the hearing to some future day, jurisdiction is lost.[17]

§ 592. **Same—Effect of Majority Protest Against Improvement.**—Section 4 provides: "If such protests are against the said improvement, and the legislative body finds that the same are signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district, all further proceedings under said ordinance or resolution of intention shall be barred, except as hereinafter provided, for six months after the presentation of such protests to such legislative body, and no new ordinance or resolution of intention for the same improvement shall be passed within said six months, unless the owners of a majority of the frontage of the property fronting on the streets or parts of streets within said assessment district shall in the mean time petition that said improvement be made." This provision seems to authorize the legislative body to determine whether or not

14 See ante, sec. 102.

15 See ante, sec. 103.

16 See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 1050.

17 See Stoner v. City of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

the petition is properly signed; and it would seem that its determination of that question is conclusive.[18] The effect of sustaining the protest is to end absolutely the pending proceedings.[19] This provision differs from the corresponding provision of the Vrooman Act in that under this act the protest must be signed by the owners of a majority of the frontage within the entire district.[20]

§ 593. **Same—Same—Exceptions.**—To the general rule that a majority protest against the improvement is a bar, the statute makes three exceptions: (1) It is not a bar "if the proposed improvement is the construction of sewers, manholes, culverts, cesspools, cross-walks, gutters, curbs or sidewalks"; or (2) if the improvement "extends for a distance of not more than one block of any street and at least one block of such street immediately adjacent thereto at both ends of the block proposed to be improved has already been improved"; or (3) if the improvement extends "for a distance of not more than one block at the end of a street and at least one block immediately adjacent thereto has already been improved." These exceptions are quite similar to the exceptions under the Vrooman Act; although the procedure in some of the excepted cases is different.[21] The effect of a protest in these cases is merely to suspend the proceedings pending the hearing.[22] The last two exceptions apply only where the work on the other blocks is of a similar character to that proposed to be done.[23] In the excepted cases a hearing is necessary.

§ 594. **Same—Procedure When Protests not a Bar.**—Section 4 requires that if the protests are not a bar, or are

[18] As to the conclusiveness of the council's determination that a petition has been properly signed, see section 364.

[19] See ante, sec. 99 ff.

[20] See ante, sec. 99 ff.

[21] See ante, secs. 106–110.

[22] See ante, secs. 106–110.

[23] See ante, sec. 108.

against the extent of the assessment district, "the legislative body shall hear said protests at said meeting, or at any time to which the hearing thereof may be continued, and pass upon the same, and its decision shall be final and conclusive. If such protests are sustained, no further proceedings shall be had under said ordinance or resolution of intention, but a new ordinance or resolution of intention for the same improvement may be passed at any time. If such protests are denied, the proceedings shall continue as if such protests had not been made." The decision of the legislative body is final only as to matters which it is authorized to determine. It does not correct any jurisdictional defect in the proceedings.[24]

§ 595. Ordinance or Resolution Ordering the Work.—Section 5 provides: "If no protests are filed at or before the time fixed for the hearing thereof by the ordinance or resolution of intention, or if protests are filed, and after hearing are denied, as above provided, the legislative body shall have jurisdiction to order the improvement described in the ordinance or resolution of intention. Having acquired such jurisdiction, it shall by ordinance or resolution order such improvement to be made, and refer the same to the commission hereinafter provided for, to estimate the damages caused thereby, and report an assessment of said damages, and of all costs and expenses of the improvement, on the property benefited thereby. Said ordinance or resolution shall describe the improvement in the same manner as the ordinance or resolution of intention, and shall be published by two insertions in a daily or weekly newspaper published and circulated in said city, or if no such newspaper be so published and circulated, said ordinance or resolution shall be posted on or near the chamber door of the legislative body, and at two other public places in said city." The ordinance or resolution of intention is the

[24] See ante, secs. 251–263.

measure of jurisdiction.[25] The resolution should designate the newspaper in which notices must be published.[1] It must not be passed before the time fixed by the statute.[2] It is to be noted that the resolution must be posted as well as published.

§ 596. **Commissioners.**—Section 6 provides: "In any city having a board of public works created by its charter or by law, such board, and in other cities the mayor, city engineer or surveyor and superintendent of streets, or if all of such officers last mentioned do not exist in cities having no board of public works, any three competent and disinterested persons appointed by said legislative body, shall act as a commission to estimate the damages caused by said proposed improvement and to assess the same, and all costs and expenses of said proposed improvement upon the property benefited thereby. Such commissioners, if they are appointed by said legislative body as aforesaid, shall be sworn to make the assessment of benefits and damages faithfully, impartially and to the best of their ability. Said commission shall have power to subpoena witnesses to appear before it to be examined under oath, which any of said commissioners may administer." This corresponds, in a general way, to section 40 of the Vrooman Act.

§ 597. **Claims for Damages—Time and Notice of Hearing.**—Section 7 provides: "Upon the passage of the final ordinance or resolution referred to in section 5 hereof said commission shall appoint a time and place for the hearing of petitions for damages caused by said improvement, and shall cause notice of such time and place to be published for at least five days in a daily newspaper, or three times in a weekly newspaper, published in said city, or if no such

[25] See ante, sec. 131.
[1] See ante, sec. 134.
[2] See ante, sec. 129.

newspaper is so published and circulated, then by posting for two days in three public places in said city. The time set for hearing such petition shall be not less than thirty days from the first publication or posting of such notice. Before said hearing said commission shall view the location of the proposed improvement, and the property affected thereby. Said hearing may be continued from time to time by said commission." This differs from the change of grade provisions of the Vrooman Act, which do not require the commissioners to take testimony.

§ 598. **Same—Form of—Necessity for Filing.**—Section 8 provides: "At or before the time set for hearing of petitions for damages any person owning property and claiming that the same will be damaged by said proposed improvement, shall file with the city clerk, who shall transmit the same to the commission, a petition showing the fact of such ownership, the description of the property claimed to be damaged, its market value, and the amount of damages which it is claimed such property will sustain by the proposed improvement, and the postoffice address of such petitioner, or his agent. Every such petition shall be verified by the oath of the petitioner or his agent. . . . . No damages or compensation whatsoever shall be allowed or awarded to the owner of any property affected by said improvement unless a petition therefor be filed as provided in this section, and any property owner who fails to file a petition for damages as hereinbefore provided, shall be deemed to have waived any and all claims for damages caused by said improvement." This corresponds in a general way with section 39 of the Vrooman Act. Under a similar statute, it has been held that such a petition is essential to a right to damages.[8] And it has also been held that the commissioners

[8] See Matter of Beale St., 39 Cal. 495. See, also, German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

must not award a greater amount than that claimed.[4] What are proper items of damage has been considered in an earlier chapter.[5]

§ 599. **Same—Hearing and Determination.**—Section 8 provides: "After considering the petitions filed as hereinbefore provided, and after hearing the petitioners who may appear, and after viewing the location of the proposed improvement and the property affected thereby, said commission shall proceed to determine the amount of damages, if any, which will be sustained by each such petitioner because of the proposed improvement." The commission is authorized to make its determination only after certain formalities have been observed. These may be of some benefit to parties liable to assessment. Hence it would seem that the statutory requirements must be observed. This act is more specific than the other acts in prescribing the procedure which the commissioners must follow. As we shall see, the determination of the commissioners is not conclusive.

§ 600. **The Contract—In General.**—A peculiarity of this statute is that the contract may be let a considerable time before it is intended that work shall commence. It is the apparent purpose to determine the amount necessary for the work in time to allow the commissioners and the council to act intelligently in fixing the assessment. The procedure for the award of the contract is similar in many respects to that prescribed by the Vrooman Act; but there are several variations due to the peculiarity of the procedure under this act.

§ 601. **Same—Notice Calling for Bids.**—Section 9 provides: "Before the awarding of any contract by the legislative body for doing any work authorized by this act, said

[4] See Matter of Beale St., 39 Cal. 495.

[5] See ante, sec. 5.

legislative body shall cause notice, with specifications, to be posted conspicuously for five days on or near the chamber door of said legislative body, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work inviting said proposal, and referring to the specifications posted or on file, to be published for two days in a daily, or weekly newspaper published and circulated in said city, designated by said legislative body for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided." This is practically identical with the corresponding provision contained in section 5 of the Vrooman Act, which has already been discussed.[6] The requirement that specifications be posted implies that they must be adopted by the legislative body prior to that time.[7] The council must also designate the newspaper in which the notice shall be published. It is to be noted that neither this act nor the Vrooman Act requires the legislative body to fix any time within which bids may be received.[8]

§ 602. **Same—Bids.**—Section 9 further provides: "Every bid shall be delivered to the clerk of the legislative body and shall be accompanied by a check certified by a responsible bank, amounting to ten per cent of the amount of the bid, payable to the order of the said clerk, or by a bond for the said amount, and so payable, signed by the bidder and by two sureties who shall justify before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions, and said amount shall be forfeited to the city in case the bidder depositing the same does not, within ten days after written notice that the contract has been awarded to him, enter into a contract with the city to do the work, with the bond here-

[6] See ante, sec. 134 ff.

[7] See ante, secs. 134, 135. As to what the specifications may and may not contain, see ante, secs. 120–128.

[8] See ante, sec. 135.

inafter required, and any other bonds required by law. Said bids shall be opened by the legislative body in public session and publicly declared, and no bid shall be considered unless accompanied by said bond or said certified check." In general, this is similar to the corresponding provision of section 5 of the Vrooman Act.[9] A failure to file a satisfactory bond or check does not make an assessment void.[10] The requirement that the bids must be publicly declared is satisfied if the bids are opened and read in open session.[11] Bids must be in such form that the award will amount to an acceptance of a valid written offer, binding both parties.[12]

§ 603. **Same—The Award.**—Section 9 provides: "The legislative body must let the contract to the lowest responsible bidder who shall give bond for the faithful performance of the work in such sum as may be required by it, and such other bonds as may be required by law, with sureties satisfactory to said legislative body; provided, however, that the legislative body may reject any and all bids, should it deem this for the public good, and also the bid of any person who has been delinquent or unfaithful in the performance of any former contract with the city, or of any other contract let by or under the authority thereof." This gives a wide discretion to the legislative body in the award of the contract. The determination of the council as to who is a responsible bidder will not ordinarily be interfered with by the courts.[13] The effect of the award of contract is to make a contract to enter into a contract. Notice to the successful bidder is necessary in order to impose upon him the duty of entering into the written contract. The statute makes no provision for re-advertising for bids in case the

[9] See ante, sec. 137.
[10] See ante, sec. 138.
[11] See ante, sec. 139.
[12] See ante, sec. 137.
[13] See ante, sec. 141.

person to whom the contract is awarded fails to enter into the written contract; although there is a provision for re-advertising upon abandonment. It is to be noted that there is no provision as to what official shall enter into the formal contract on behalf of the city. Under the circumstances, it would seem that the contract must be executed in the manner provided for other municipal contracts.

§ 604. **Same—Contents.**—There are but two matters which this statute expressly requires to be inserted in the contract. (1) "The contract must provide that the work shall be done under the supervision of the city engineer or surveyor, and no work shall be paid for until it has been accepted by the legislative body." This differs from most of the other acts, which generally require the work to be done under the supervision of the superintendent of streets. A contract is sufficient if it contains this provision in substance.[14] (2) "The contract shall provide that the work must be commenced within twenty days after the contractor receives written notice from the superintendent of streets that there is sufficient money in the special fund devoted to the proposed improvement to pay the contract price, and completed within such time as the legislative body shall prescribe." This provision is mandatory, and compels the contractor to complete the work within the time fixed. Under the Vrooman Act, it is held that unless the work is completed within the time limited, or within a valid extension thereof, the contractor cannot recover upon the assessment.[15] This act makes no provision for an extension of time. In addition to the matters expressly enumerated the contract should also contain the following: (3) A provision making eight hours a day's work. We have seen, under the Vrooman Act, that the provisions of the Penal Code relating to hours of labor do not apply to that act.[16] The reasoning,

[14] See ante, sec. 160.
[15] See ante, sec. 167.
[16] See ante, sec. 126.

however, does not apply to the present act, for under this act the money is to be paid to the contractor out of a fund in the city treasury. (4) A provision making two dollars per day the minimum wage for work done under the contract.[17]

§ 605. **Procedure for Acceptance of Work.**—Section 9 prescribes a procedure to be followed by the contractor when he desires his work accepted. "Whenever the contractor desires the work or part thereof to be accepted he must make written application to that effect to the legislative body. Upon the filing of such application for acceptance, the clerk of the legislative body shall give not less than five days' notice by publication by two insertions in a daily or weekly newspaper published and circulated in the city, or by posting for two days in three public places in the city, in case no such newspaper is published and circulated therein, that at a certain time and place to be named in said notice the legislative body of the city will hear and consider any objections to the acceptance of the work, or part of the work, for the acceptance of which said contractor has made such application, and only after such hearing shall any work be accepted. If upon such hearing any objections to the acceptance are made and are sustained by the legislative body, the legislative body must require the contractor to take such steps as will remove such objections; and in the event of his failure to do so within such time as the legislative body shall prescribe, the legislative body may relet such portion of the work and charge the contractor the cost thereof together with all expenses incident to said reletting, and retain the same out of any moneys due or to become due to him under the contract, and also hold him and his sureties responsible therefor upon his bond." In a general way this corresponds to the appeal under the Vrooman Act; but the procedure is very different. It is to be

[17] See ante, sec. 163.

noted that while this is contained in the section relating to the letting of the contract, the work cannot be done until after the money is on hand. Several of the subsequent sections relate to matters which must be attended to before work can commence.

§ 606. **Procedure on Abandonment.**—Section 9 provides: "If the contractor abandons the work, or fails to proceed with the same as rapidly as required by his contract, the legislative body may relet the contract, or any portion thereof, and pay the cost of the same and also any expenses incidental to the reletting, out of any funds due or to become due the contractor, and also hold him and his sureties responsible upon his bond for such cost and expenses, and also for any damages resulting from such abandonment."

§ 607. **Notification of Commissioners.**—Section 9 provides: "Upon the signing of the contract for the doing of the work, the clerk of the legislative body, if there be no board of public works in said city, shall certify to such commission the amount of the contract price." The purpose of this is to advise the commissioners that they may proceed to file their report. This does not limit the right of the commissioners to have a hearing prior to the execution of the contract.

§ 608. **The Commissioners' Report—Contents.**—The commissioners must not file their report until the contract is signed. Section 10 provides: "The commission shall, as soon as practicable, after determining what damages will be caused by said improvement, and, after the signing of the contract for the work, assess the total amount of the damages so determined, the total amount of the contract price for the doing of such work, and the total amount of all the incidental expenses of such improvement, which shall include the necessary expenses and disbursements of the

commission, the cost of making the assessment, and all expenses necessarily incurred by the city in connection with the proposed improvement for maps, diagrams, plans, surveys and other matters incident thereto, upon the respective lots or parcels of land in the assessment district described in the ordinance or resolution of intention, in proportion to the benefits to be received by such lots or parcels of land, respectively, from the said improvement, and shall make and file with the clerk of the legislative body a report in writing containing the following:

"1. A schedule describing the lots or parcels of land belonging to each petitioner for damages and which will be damaged by said proposed improvement, stating the amount of damages to each lot or parcel as determined by the commission, and the name of the owner of each such lot or parcel of land so damaged.[18]

"2. A diagram showing the assessment district, and also the boundaries and dimensions of the respective lots or parcels of land within said district, and each of such lots or parcels of land shall be given a separate number in red ink upon said diagram."

This requirement is quite similar to the requirement for the report under the Local Improvement Act of 1901.[19] Its provisions must be complied with. Thus, a diagram which fails to show the dimensions of the lots is insufficient. The diagram should show the directions, although this need not be done by arrows.[20]

"3. A proposed assessment of the total amount of damages that will be caused by said improvement, as determined by the commission, the total amount of the contract price for the work and the total amount of the incidental expenses thereof as above specified, upon the respective lots or parcels of land in said district in proportion to the benefits to

[18] As to what damages are allowable, see ante, sec. 5.
[19] See ante, secs. 520–524.
[20] See ante, sec. 212.

be received by such lots or parcels of land, respectively, from said improvement. Said assessment shall refer to such lots or parcels of land upon said diagram by the red ink numbers thereof, and need contain no other description thereof, and shall show the names of the owners, if known, otherwise designating them as unknown; but no mistake in the name of the owner of any lot or parcel of land shall affect the validity of the assessment thereon."

It is a general rule that the assessment must contain the matters enumerated by the statute.[21] Particularity as to the name of the owner is not required, for under this act an error in name does not affect the validity of the assessment. The section further provides that "in case the commissioners do not all agree, a majority of the whole number may make such report."

§ 609. **Same—Notice of Hearing.**—Section 11 provides: "Upon the filing of the report provided for in section 10 hereof, the clerk of the legislative body shall present such report to the legislative body, which shall fix a day for the hearing thereof by said legislative body, which day shall not be less than twenty days from the date of filing such report, and shall cause a notice of such hearing to be published by the clerk thereof, by three insertions in a daily newspaper published and circulated in said city, or if there be no daily newspaper in said city, then by two successive insertions in a weekly newspaper so published and circulated; or if no newspaper is so published and circulated, then by posting for two days in three public places in said city. Such publication shall be completed at least ten days before the date fixed for the hearing. Said notice shall state the fact that such report has been filed, and the date set for the hearing thereof, and require all persons interested to file with the clerk their objections, if any they have, to the confirmation of said report at or before the time fixed

21 See ante, sec. 209 ff.

for the hearing." It is necessary for the council both to fix the time and direct the notice.

§ 610. **Same—Objections—Hearing and Determination.** Section 12 provides: "Any objection to said report shall be in writing signed by the objector, or his agent, and shall comply with the requirements of section 4 hereof for the form and substance of protests, and shall be filed with the clerk of the legislative body at or before the time fixed for the hearing." The form of protests is prescribed by section 4.[22] The section continues: "At the time fixed, or at any other time to which the hearing may be continued, the legislative body shall hear said report and any objections thereto, and any person interested may appear and be heard upon said report and objections." The hearing must not be held before the time fixed;[23] and jurisdiction is lost unless a hearing is had or is postponed at the time fixed.[24] The section then provides: "After such hearing the legislative body shall pass upon the report and may confirm, modify or correct the same, or may confirm the report as modified or corrected, or order the commission to make and file a new report, which shall be heard in like manner as the first report, and after like notice of hearing. If no objections are filed, or if the objections filed are not sustained, the legislative body shall confirm the report. The action of the legislative body upon said report shall be declared by resolution entered upon its minutes, and shall be final and conclusive, except as to the damages to be caused by the proposed improvement." While the action of the council is conclusive as to the liability of the property in case the proceedings are regular, it does not cure any jurisdictional defects in the proceedings.[25] The provision that the action shall not be

[22] See ante, sec. 591.

[23] See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

[24] See Stoner v. City of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

[25] See ante, secs. 251–263.

conclusive as to damages is made necessary by the constitutional provision that property shall not be damaged for public use without compensation, which is construed to compel a trial in court, unless such trial is waived.[1]

§ 611. **Recording Assessment-roll — Lien.** — Section 12 provides: "When said report is confirmed, or is confirmed as modified or corrected, the clerk of the legislative body shall transmit the diagram and assessment provided for in section 10 hereof, as finally confirmed, to the city tax collector. The tax collector shall thereupon record such assessment and diagram in his office in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment-roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment-roll. Immediately upon such recording the several assessments contained in such assessment-roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made, paramount to all other liens, except taxes and prior assessments; and such lien shall only be discharged by payment of the assessment or by redemption of the land after sale for delinquency." The record of the assessment-roll is essential to the validity of the assessment.[2] The statement as to the priority of the lien is the general rule applicable to street assessments. Thus, it is held that a street assessment lien is prior to a mortgage.[3]

§ 612. **Notice That Assessment is Due.**—The provisions for the collection of the assessment and for sale upon delinquency are quite similar to the former provisions relating to general taxation. Hence, cases dealing with general taxation are, in many instances, clearly in point. Several

1 See ante, sec. 385.
2 See ante, sec. 220 ff.
3 See ante, secs. 229–231.

of the other street acts have similar requirements. Section 12 provides: "The tax collector shall, upon the recording of said assessment, give notice by publication for five days in a daily newspaper published and circulated in said city, or by two insertions in a weekly newspaper so published and circulated; or in case no such daily or weekly newspaper is so published and circulated in said city, then by posting such notice for four days in three public places in said city, that said assessment has been recorded in his office and that all sums assessed therein are due and payable immediately, and that payment of the said sums must be made to him within thirty days after the date of the first publication or posting, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of the said thirty days shall become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto." The publication of this notice is essential, for the assessment is not delinquent until thirty days after the first publication.[4]

§ 613. **Payment of Assessment.**—Section 12 provides: "When payment of any assessment is made the tax collector shall mark opposite such assessment the word 'paid,' the date of payment, and the name of the person by or for whom the same is paid, and shall give a receipt therefor. Upon the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the tax collector shall mark each such assessment 'delinquent' on said assessment-roll, and add five per cent to the amount thereof." Payment may be made at any time prior to the sale. Section 13 provides: "At any time after such delinquency and prior to the sale of any piece of property

[4] Under the general tax law, it is held that a similar provision is directory only: See Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549. Under the general law, however, the time of delinquency does not depend upon publication.

assessed and delinquent, any person may pay the assessment on such piece of property, together with the penalties and costs due thereon, including the cost of advertising, if such payment is made after the first publication of the list of delinquent assessments."

§ 614. **Publication of Delinquent List.**—Section 13 provides: "The tax collector shall within ten days from the date of such delinquency begin the publication of a list of the delinquent assessments, which list must contain a description of each lot or parcel of land delinquent, and opposite each description the name of the owner as stated in the assessment-roll, and the amount of the assessment and costs due, including the cost of advertisement, which cost of advertisement shall not exceed the sum of fifty cents for each parcel of land separately assessed. He shall append to and publish with said delinquent list a notice that unless each assessment delinquent, together with the penalty and costs thereon, is paid, the property upon which such assessment is a lien will be sold at public auction at a time and place to be specified in the notice. Such publication must be made by five insertions in some daily newspaper published and circulated in the city, or by two insertions in a weekly newspaper so published and circulated, or, in case no such newspaper is so published and circulated in said city, such list of delinquent assessments and notice shall be posted in three public places in said city for five days. The time of sale must not be less than five days nor more than ten days after the last publication of said list, or after the completion of such posting, as the case may be, and the place of sale must be in or in front of the office of the tax collector." In construing a similar statute, the Supreme Court has held that the enumeration of these particulars is equivalent to a declaration that none other need be published.[5] The description of the property need not

[5] Davis v. Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15.

be identical with that in the assessment, provided it is sufficient to identify the property.[6] Abbreviations may be used.[7] A failure to state the names of the owners as stated in the assessment-roll makes the notice insufficient.[8]

§ 615. **Sale of Property for Nonpayment of Assessment.** Section 14 provides: "At the time and place fixed for the sale the tax collector must commence the sale of the property advertised, commencing at the head of the list, and continuing in numerical order of lots or parcels of land until all are sold; provided, that he may postpone or continue the sale from day to day until all the property is sold. Each lot or parcel of land separately assessed must be offered for sale separately, and the person who will take the least quantity of land and then and there pay the amount of the assessment, penalty and costs due, including fifty cents to the tax collector for a certificate of sale, shall become the purchaser. In case there is no other purchaser for any lot or parcel of land offered for sale, the same shall be struck off to the city as purchaser." A sale can be made only in the manner and under the circumstances authorized. A sale for more than the amount due is void.[9] The mere fact, however, that the certificate and the deed differ in their recitals as to the sum does not invalidate the sale. The presumption is in favor of the regularity of official action.[10]

§ 616. **Certificate of Sale.**—Section 15 provides: "After making the sale the tax collector must execute in duplicate a certificate of sale setting forth a description of the prop-

[6] Davis v. Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15.

[7] Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Rollins v. Woodman, 117 Cal. 516, 49 Pac. 455.

[8] Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

[9] Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Harper v. Rowe, 53 Cal. 233; Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

[10] Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

erty sold, the name of the owner thereof as given in the assessment-roll, that said property was sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which such property was sold, the date of sale, the name of the purchaser, and the time when the purchaser will be entitled to a deed. The tax collector must file one copy of such certificate in his office and deliver the other to the purchaser, or if the city is the purchaser, to the clerk of the legislative body, who shall file the same in his office. Upon the filing of the copy of such certificate in the office of the tax collector, the lien of the assessment shall vest in the purchaser and is only devested by a redemption of the property as in this act provided. The tax collector shall also enter upon the assessment-roll opposite the description of each piece of property offered for sale, the description of the portion thereof sold, the amount for which the same was sold, the date of the sale and the name of the purchaser." Inasmuch as the statute prescribes the form and contents of the certificate, it must, in order to be valid, contain all the matters prescribed. The description must be such as to enable the owner to know what land is charged with the assessment, and to enable the purchaser to know what land is sold.[11] The term of redemption should be stated as the concurrent happening of the giving of proper notice of application for a deed and the expiration of one year.[12] A failure to state the name of the owner of the property, where known, is fatal. The certificate must be dated as of the day of sale, but may be made out later.[13]

§ 617. **Redemption.**—Section 16 provides: "At any time before the expiration of one year from the date of the sale, any lot or parcel of land sold for a delinquent assessment may be redeemed by any party in interest by the payment to

11 Miller v. Williams, 135 Cal. 183, 67 Pac. 788.
12 Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.
13 Maina v. Elliott, 51 Cal. 8.

the tax collector of the amount for which the property was sold, and in addition thereto, ten per cent thereon if paid within six months from the date of sale; and twenty-five per cent if paid within twelve months. When redemption is made the tax collector shall note that fact and the date thereof on the duplicate certificate of sale on file in his office, and deposit the amount paid with the city treasurer, who shall credit the purchaser named in the certificate of sale with the said amount and pay the same to such purchaser, or to his assigns, upon the surrender of the certificate of sale and upon satisfactory proof of assignment thereof, if any. When the city is the purchaser, the tax collector shall notify the clerk of the legislative body of the redemption and such clerk shall thereupon cancel the certificate of sale on file in his office."

§ 618. **Notice of Application for Deed.**—Section 17 provides: "The purchaser or his assignee, must at least thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth a description of the property, that said property has been sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which it was sold, the amount necessary to redeem at the time of giving notice, and the time when such purchaser or assignee will apply to the tax collector for a deed. If the said owner cannot be found, after due diligence, said notice must be posted in a conspicuous place on said property, at least thirty days before the time stated therein at which the application for a deed will be made. The person applying for a deed must file with the tax collector an affidavit or affidavits showing that notice of such application has been given, as herein required, and if the notice was not served on the owner of the property personally, that due diligence was used to find said owner;

which affidavit or affidavits must be filed by the tax collector in his office. If redemption of the property is made after such affidavits are filed, and more than eleven months from the date of sale, the person making such redemption must pay, in addition to the other amounts required, three dollars for the service of notice and the making of such affidavits, which amount shall be paid over to the purchaser or his assignee in the same manner as other sums paid for redemption. No deed for any property sold for delinquent assessment shall be made until the purchaser or his assignee has complied with all the provisions of this section, and filed the proper affidavits with the tax collector."

The notice must contain all the matters required by the statute. A notice which fails to state the date of sale or the amount for which the property was sold is insufficient.[14] It must specify the correct amount for which the property was sold.[15] A notice which states a larger amount due than is legally due is insufficient.[16] The date fixed for application for a deed must be fully thirty days after the date of service.[17] The notice need not be dated.[18] It must be served in the manner prescribed, and within the time prescribed. Not only must notice be served, but legal proof thereof must be made.[19] The tax collector is authorized to make the deed only after the proof is filed.

§ 619. **The Deed.**—Section 17 provides: "At any time after the expiration of twelve months from the date of sale, the tax collector must execute to the purchaser, or to his

14 Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573.

15 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

16 Reed v. Lyon, 96 Cal. 501, 31 Pac. 619. But the fact that it states, in addition to the amount due, that three dollars will be due for service of notice is immaterial: Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

17 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

18 Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

19 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761; Hall v. Capps, 107 Cal. 513, 40 Pac. 809; Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

assignee on his application, if such purchaser or assignee has complied with the provisions of this section, a deed of the property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof, and the fact that no person has redeemed the property. The tax collector shall receive from the applicant for a deed, one dollar for making such deed, unless the city is the purchaser, in which case no charge shall be made therefor." A failure to state any of the matters required, such as the amount paid,[20] or the time when the purchaser is entitled to a deed,[21] makes the deed void. A statement "that the least quantity of the land described was offered for sale; that the plaintiff was the person who was willing to take the least quantity thereof and pay the taxes and costs; and that such least quantity was the whole of the land," is sufficient.[22] A defective deed cannot be cured by a reference to the certificate of sale.[23]

§ 620. **Effect of Deed as Evidence.**—Section 17 provides: "Such deed shall be prima facie evidence of the truth of all matters recited therein and of the regularity of all proceedings prior to the execution thereof and of title in the grantee." The effect of this is to make the deed admissible in evidence without preliminary proof of the regularity of the proceedings.[24] It does not, however, prevent an owner from setting up defects in the proceedings which render the deed void.[25] And, of course, it has no effect whatever where it is void on its face.

[20] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[21] Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573. But see Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287, where a deed reciting that this statement was contained in the certificate was upheld.

[22] Rollins v. Woodman, 117 Cal. 516, 49 Pac. 555. See, also, Doland v. Mooney, 79 Cal. 137, 21 Pac. 436; Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287.

[23] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[24] Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

[25] Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

§ 621. **Disposition of Funds Collected.**—Section 18 provides: "The funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment, or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said city, who shall place the same in a special fund designated by the number or name of the proceedings, and payments shall be made out of said special fund only for the purposes provided for in this act. To expedite the making of any such improvement, the legislative body may at any time transfer into said special fund, out of any money in the general fund, such sums as it may deem necessary, and the sums so transferred shall be deemed a loan to such special fund and shall be repaid out of the proceeds of the assessments provided for in this act. After all sales provided for in section 14 of this act have been made, the tax collector shall report to the legislative body of the city the amount collected."

§ 622. **Notice to Contractor and Notice of Payment of Damages.**—Section 19 provides: "When sufficient money is in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the total amount of estimated damages therefrom, all expenses of the proceeding and the cost of doing the work, it shall be the duty of the clerk of the legislative body to notify the contractor for the work of that fact, and to draw demands on said special fund for the respective amounts of damages awarded by the report, and to notify the owner of each parcel of land declared by the report to be damaged if the name of such owner is stated in the report, that the awards of damages are payable, and that he may receive the sum awarded to him on executing a release to said city of all liability for damages caused by said improvement. Such notification may be given by depositing a notice, postage prepaid, in the postoffice addressed to such person at his last known place of residence." The purpose of the notice

to the contractor is to fix the time for commencement of work. The purpose of the notice to the owners damaged is to enable them to claim the amount awarded. As we have seen, it does not give the city the right to proceed with the work.

§ 623. **Procedure Where Owners Refuse to Accept Damages Awarded.**—Section 20 provides: "If any owner of property that will be damaged by the proposed improvement shall fail or refuse to accept the amount awarded to him by the report provided for in section 10 hereof, the legislative body may cause proceedings to be brought against him in the name of the city, in the proper Superior Court, to have the amount of damage to such property determined. Such proceedings shall conform, as nearly as may be, to the provisions of the Code of Civil Procedure regarding eminent domain; provided, however, that the plaintiff shall not be required to pay the amount of damages awarded within thirty days after judgment. In such proceeding the ordinance ordering the improvement shall be conclusive evidence of the necessity of the same. If no such proceeding is brought against him any owner of property that is damaged by the proposed improvement may decline to accept the amount awarded him, if any, and bring an action against the city to recover the amount to which he claims to be entitled. Any such action must be brought within thirty days after the final completion of the improvement. If in such action he fails to recover more than the amount awarded to him by the report aforesaid, he shall not recover costs." The purpose of this section is to satisfy the constitutional requirement, which has been held to require a court proceeding where the owner does not waive it. Such proceedings are discussed more in detail in a later chapter.[1] It is probable that an owner may enjoin the

[1] See post, sec. 724.

doing of work which will damage his property until damages are paid.

§ 624. **Supplemental Assessment.**—Section 21 provides: "If the first assessment for any improvement fails to raise a sufficient amount of money to pay all costs, damages and expenses of the improvement, including any judgments rendered in the actions and proceedings mentioned in section 20 and the costs and expenses of such actions or proceedings, the legislative body may pay the deficit out of the general fund, or may order a supplemental assessment to raise such deficit, which shall be made and collected in the same manner, as nearly as may be, as the first assessment, and so on until sufficient money shall have been raised to pay for such improvement." This does not limit the power of the legislative body to one supplemental assessment.[2]

§ 625. **Proof of Posting and Publication.**—Section 21a, added to the statute in 1911, provides: "Proof of publication of any notice required by this act shall be made by affidavit as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting." This is in addition to the provisions of section 4, which requires such proof before a hearing of protests.

[2] See ante, sec. 561.

CHAPTER VII.

THE TREE PLANTING ACT.

§ 626. Scope of the act.
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§ 626. **Scope of the Act.**—The Tree Planting Act is, as its name indicates, an act to provide for the planting, maintenance and care of shade trees upon the streets of cities. It was adopted in 1893, and has been amended but once. In 1909 section 2 was amended by the addition of the last sentence; but otherwise the act remains as it was originally passed. The scope of the act is stated in the first section. "'All streets, lanes, alleys, places, or courts in the municipalities of this state now open or dedicated, or which may hereafter be opened or dedicated, to public use, whose grade has been officially established, and which have been actually graded in conformity therewith, may be planted with shade trees, along the edges of the sidewalks thereof, by order of the city council, which shall have power, also, to provide for the maintenance and care of the same; and the

city council shall have power to prescribe the height, thickness, and manner of trimming of all hedges set out, or that shall hereafter be set out, along the line of any street, lane, alley, place, or court dedicated to public use, whether graded or not, and to compel compliance with its ordinances in the premises by the owners or occupants of the lots fronting thereon. The powers hereby conferred upon city councils shall be exercised in the manner and under the proceedings hereinafter described." The only conditions to the exercise of the jurisdiction here provided are that the street has been opened or dedicated to public use, that the official grade has been established, and that the grading has been actually done on the ground. Section 13, however, provides that "this act shall only apply to such municipalities as shall by vote of the electors residing therein determine to come within its provisions."

§ 627. **Outline of the Procedure.**—The procedure under this act is based upon that of the Vrooman Act. In outline, it is as follows: (1) The council must pass a resolution of intention. (2) The street superintendent must thereupon post notices along the street, and the clerk must cause the resolution to be published. (3) The owners of a majority of the frontage may protest. If the objection is as to the kind of trees, it must name a substitute. (4) A hearing must be had, after notice to the objectors. The decision of the council is final, except as to the kind of the trees, which matter is governed by the desire of the majority as expressed in the protest. If the objections are sustained, a new proceeding cannot be started for six months. (5) Thereafter the council must pass a resolution ordering the work. (6) The contract is then let, in much the same manner as under the Vrooman Act. It must provide for maintenance for three years, and the payments must be made in installments, the last to be paid at the expiration of the three year period. (7) At the completion of the

work, the street superintendent must make an assessment upon the front-foot plan, which must be enforced in the same manner as the assessment under the Vrooman Act.

§ 628. **Resolution of Intention.**—The first step in the proceedings is the adoption of a resolution of intention. Section 2 provides: "The city council of any municipality in the state may, at its discretion, pass a resolution of intention to plant, or cause to be planted, with shade trees, any graded street, lane, alley, place, or court within the limits of such municipality. Such resolution of intention may embrace the entire length of any street, lane, alley, place, or court, or any portion thereof, but must specify the kind of trees to be planted, their size, age, and their distance apart." The resolution of intention under this type of statute is the basis of the subsequent proceedings, and is jurisdictional.[1] It must state what portion of the street is to be so improved. It would seem that the recital of the details expressly required would be a sufficient description of the work to be done. It should designate the newspaper in which the resolution should be published. This designation must be made before the publication; and while it may be made by a separate resolution, it is better practice to include it in the resolution of intention.[2] The resolution should provide for the maintenance of the trees for three years by the contractor.

§ 629. **Notice of the Resolution.**—The method of giving notice differs slightly from that required by the other acts. Section 2 provides: "The street superintendent shall thereupon cause to be conspicuously posted along both sides of the street mentioned in the resolution, at not more than three hundred feet in distance apart, notices of the passage

[1] See ante, sec. 64 ff.

[2] See ante, sec. 90. For a discussion of the requirements of the resolution of intention under the Vrooman Act, upon which this act is modeled, see ante, sec. 64 ff.

of said resolution. Said notice shall be headed 'Notice to plant shade trees,' in letters not less than one inch in length, and shall, in legible characters set forth the language of the resolution, and the date of its passage." This practically requires that the street superintendent set out the resolution in full, athough perhaps some of the formal parts may be omitted. In this respect the notice differs from the corresponding notice under the Vrooman Act, which merely sets forth certain facts and refers to the resolution for further particulars.[3] This notice must state the date of the passage of the resolution. It must be posted on both sides of the street. In this respect also this act differs from the Vrooman Act.[4] The section then provides for publication of the resolution. "The city clerk shall also cause a copy of the resolution to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council. Should there be no daily newspaper published in said city then in such case publication may be made of such resolution, and of all other matters herein provided to be published, in a weekly newspaper, published and circulated in said city, and designated by said city council." The last sentence was added to the act in 1909. The resolution must be published in the newspaper designated by the council. Publication in another paper is not sufficient.[5]

§ 630. **Objections to the Work.**—The only protest allowed is a majority protest. Section 3 provides: "The owners of a majority of the frontage of the property on both sides of the street proposed to be planted as aforesaid may, within ten days after the time of publication of said resolution, file their written statement of the objections to the proposed work with the city clerk, which must be signed

[3] See ante, sec. 94.
[4] See ante, sec. 95.
[5] See ante, sec. 90.

by the objectors, each one writing after his or her name the number of feet frontage owned by him or her. Such objection must show wherein the parties making them will be injured or aggrieved by the proposed work, and if the objection be to the kind of trees proposed to be planted, they must name some other kind of trees to be substituted therefor." The objections, in order to be entitled to consideration, must be filed within the time limited.[6] They must contain the matters prescribed. It is a general rule, however, that protests will not be strictly construed.[7]

§ 631. **Hearing and Determination.**—Section 3 provides: "The city council shall, at its next meeting after the filing of said objections, fix a time for hearing the same, not less than one week thereafter. The city clerk shall thereupon notify each objector, or his agent, who has signed his or her name to the statement, by depositing, in the postoffice of said city a notice addressed to him or her, postage prepaid, notifying the objectors of the time and place of hearing. At the time specified, the council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive, except that in the choice of trees to be planted, it shall be governed by the written request of the owners of a majority of the frontage on both sides of the street which it is proposed to plant. If the objections be sustained, no further proceedings shall be taken under the resolution of intention for six months after the date of its passage. If it be again proposed to plant the street, the council shall commence proceedings de novo as if no action had been previously taken." It is probably not necessary to have a hearing when the protest is not signed by the owners of a majority of the frontage. The hearing is essential when the objections are properly signed. A failure to have the hearing will invalidate the proceedings.[8]

[6] See ante, sec. 104.
[7] See ante, sec. 102.
[8] See ante, sec. 107.

The hearing must not be held before the time fixed.[9] The decision is final and conclusive only as to matters which the council is authorized to pass upon. It does not cure jurisdictional defects.[10] After sustaining a protest, the council cannot reconsider its action.[11]

§ 632. **Resolution Ordering the Work.**—Section 4 provides: "At the expiration of ten days after the expiration of the time of publication of said resolution of intention, if no written objections to the work therein described shall have been filed with the city clerk, as hereinbefore provided, otherwise, immediately upon the overruling of the objections by the council, the council shall be deemed to have acquired jurisdiction to order to be done the work which is authorized by this act, which order shall be published for two days in the same papers and manner as provided in the resolution of intention." The resolution of intention is the measure of jurisdiction. The resolution ordering the work must be for the same work provided for by the resolution of intention.[12] The resolution ordering the work must not be passed before the time fixed. A resolution prematurely passed is void.[13] Inasmuch as the statute provides in what papers the resolution shall be published, it would seem unnecessary for the resolution to designate any paper. Section 5 provides: "And no order for the planting of any street shade trees shall be made that does not likewise provide for the care and maintenance of the trees for three years by the contractor planting the trees."

§ 633. **Notice Calling for Bids.**—Section 5 provides: "Before passing any resolutions for the planting of any street, the city council shall cause notice, with specifica-

9 See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.
10 See ante, secs. 251–263.
11 See ante, sec. 262.
12 See ante, sec. 131.
13 See ante, sec. 129.

tions, to be posted conspicuously for five days near the door of the council chamber, and shall advertise the same for five days in the same manner and papers as hereinbefore provided for the publication of the resolution of intention, inviting sealed proposals for bids for furnishing the trees and doing the work ordered." Reading this exactly as it stands, it says that specifications must be adopted and that the council must cause notice calling for bids to be posted and published before the resolution ordering the work is passed. It would seem that such a peculiar requirement is the result of an oversight. Several of the other street work statutes have similar provisions for notices calling for bids, but they all read, "Before awarding any contract." If this provision is taken literally, it contradicts the statement in the preceding section which states that the council has jurisdiction to order the work immediately after ruling upon the protests. Another peculiarity of this requirement is that it seems to require the publication of the specifications. Most of the other statutes provide that the specifications must be posted, but that the printed notice shall merely refer to specifications posted or on file.

§ 634. **Bids.**—Section 5 provides: "All bids shall state the sum or price for which the bidder will undertake to furnish the trees, of the kind, age, and size required, and will suitably prepare the ground, set out the trees, warrant every one of them to grow, or replace all that fail to grow or receive damage from whatever cause with others of the same kind, and of suitable age and size to preserve uniformity, and will for three years care for, cultivate, protect, irrigate, and trim said trees. . . . . All proposals or bids shall be accompanied by a check payable to the order of the mayor or president of the city council, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposals. Said proposals or bids shall be delivered to the clerk of the city

council, indorsed 'Proposals to plant trees.'" The bids must be in such form that they constitute a binding offer to enter into a contract.[14] The requirement of a check or bond is intended to secure the performance of the offer in case of acceptance by an award. The fact that the undertaking is insufficient will not invalidate a contract awarded, nor an assessment levied to pay the expenses thereof.[15]

§ 635. **The Award.**—Section 5 provides: "Said council shall, in open session, examine and publicly declare the same; provided, that no proposal or bid shall be considered unless accompanied by said check." This requires that the bids be declared in open session; but this provision is satisfied if the council opens and reads the bids in public session.[16] The section further provides: "The council may reject all proposals, should it deem this for the public good, and shall reject the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and may award the contract to the lowest responsible bidder, at the prices named in his bid, which award shall be approved by the mayor or president of the council." This gives the council a broad discretion as to the award of the contract. The courts will not ordinarily interfere with the decision of the council as to who is the lowest responsible bidder.[17] The award must be approved by the mayor or by the president of the council. In this respect this procedure differs from that of the Vrooman Act, which requires either the approval by the mayor or by a three-fourths vote of the council.[18] The section continues: "Notice of such awards of contract shall be posted and advertised for five days, in the manner hereinbefore provided."

14 See ante, sec. 137.
15 See ante, sec. 138.
16 See ante, sec. 139.
17 See ante, secs. 140, 141.
18 See ante, sec. 142.

§ 636. Execution of the Contract.—Section 5 provides that "it shall be the duty of the superintendent of streets to enter into a contract with the bidder to whom the work shall have been awarded by the council, and at the prices specified in his bid; whereupon the certified checks of all the other bidders shall be returned to them, respectively." The contractor is compelled to enter into the contract within fifteen days after the first posting and publication of the award. Section 6 provides: "Before being entitled to any contract, the bidder to whom the award shall have been made must pay into the city treasury the cost of the publication of notices, resolutions, and orders, and all other incidental expenses required under the proceedings prescribed by this act." This is intended for the benefit of the parties entitled to the payment of such sums, and may be waived by them.[19] Section 6 also provides: "All contractors shall, at the time of executing any contract for the planting and care of trees, execute a bond to the satisfaction of the mayor or president of the city council, with two or more sureties, and payable to the city in such sums as the mayor or president of the council shall deem adequate, conditioned for the faithful performance of the contract, and the sureties shall justify before the recorder or a justice of the peace, in double the amount mentioned in such bond, over and above all statutory exemption."

§ 637. Terms of the Contract.—The terms of the contract are not specifically prescribed. The contract should, however, provide for all the work described in the resolution ordering the work, including the maintenance of the work; and should provide for payments according to the terms of section 8, which provides: "All sums due to contractors under the provisions of this act shall be payable in installments, as follows, to wit: Not more than one-half the entire consideration in the contract shall be payable on

[19] See ante, sec. 155.

the completion of the planting, and out of this amount the superintendent of streets shall see that the trees are paid for, to the party furnishing the same; one-half the balance at the end of eighteen months after the completion of the planting; provided, all conditions shall have been complied with; the remaining one-half to be paid at the end of three years after the completion of the planting; provided, all conditions shall have been complied with." The contract should provide that the work shall be done under the direction of the superintendent of streets. It is probable that the rules as to hours of labor and as to minimum wages are the same as under the Vrooman Act.[20] There is no provision in the act as to how the time for the work shall be fixed.

§ 638. **Proceedings on Default of Contractor.**—Section 5 provides: "But if such lowest bidder neglects, fails, or refuses, for fifteen days after the first posting and publication of the award, to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids, as in the first instance, and shall award the contract for said work to the then lowest bidder." It will be noted that this seems to deprive the council of all discretion as to this second contract. It must be let to the lowest, not to the lowest responsible, bidder. Evidently this is one of the numerous oversights with which this act is filled. The section continues: "If the contractor who shall have taken any contract shall not complete the planting, within the time limited in the contract, or within such further time as the council may give him, the superintendent of streets shall report such delinquency to the council, which may relet the unfinished portion of the planting and the future care of the trees, after pursuing the formalities hereinbefore prescribed for the letting of the whole in the first instance."

[20] See ante, secs. 165, 166.

§ 639. **Duties of the Superintendent of Streets.**—Section 7 provides: "All work done under the provisions of this statute shall be executed under the direction of the superintendent of streets, whose duty it shall be, under the general control of the council, to see that all the obligations assumed by contractors toward the city are faithfully complied with, and that all trees furnished are sound, healthy, free from infection by insects, and of the kind, size, and age called for by the contract. He shall certify to the completion of all work, or portion of work, which by the terms of the contract, shall entitle the contractor to payment in whole or in part, and the presentation of his certificate by the contractor shall be a condition precedent to each payment that shall become due under the contract."

§ 640. **The Assessment—The Statute.**—Section 9 provides: "Immediately upon the execution of any contract for the planting and care of street trees under the provisions of this act, it shall be the duty of the city assessor to make an assessment to cover the sum to become due for the work specified in such contract (including all incidental expenses) upon the lots and land fronting on the street, lane, alley, court, or place to which such contract relates, each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per foot front sufficient to cover the total expenses of the work. Said assessment shall briefly refer to the contract, the work contracted for, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per foot front assessed, the amount of each assessment, the name of the owner of each lot, if known to the assessor (if unknown, the word 'Unknown' shall be written opposite the number or description of the lot, with the amount assessed thereon). And the assessor shall attach to said assessment a diagram, exhibiting the street, lane, alley, place, or court on which the work

is contracted to be done, and showing the relative location and frontage of such lot, numbered to correspond with the numbers in the assessment. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor or president of the council. The said assessments and warrants shall be separately issued for each payment that shall be due the contractor, as specified in section eight of this act, and shall be substantially in the following form:

"FORM OF THE WARRANT.

"By virtue hereof, I (name of the superintendent of streets), of the city of ————, county of ————, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower (name of contractor), his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his warrant for the same.

"Date ———, ———. (Name of superintendent of streets.) Countersigned by (name of mayor or president of council).

"Recorded (date ———, ———). (Name of superintendent of streets.)

"Said warrant, assessment, and diagram shall be recorded in the office of the superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots, assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged. From and after the date of said record, all persons interested in any manner in any or all of the lots assessed shall be deemed to have notice of the contents of said record."

§ 641. **Same—Interpretation.**—The provisions as to the assessment are very similar to sections 8, 9 and 10 of the

Vrooman Act, which have been discussed in an earlier chapter.[21] The assessment under this act is levied entirely by the front-foot method, but it is made by the city assessor. The only matter which needs special mention is the provision that "the said assessments and warrants shall be separately issued for each payment that shall be due the contractor, as specified in section 8 of this act." This, read in connection with the provision of section 7 that a certificate by the street superintendent that the payment is due is a condition precedent to the right to receive it, and with the provision of section 9 that the lien shall last for two years, shows clearly that three separate assessments are contemplated. This means that the contractor may have to bring three foreclosure actions to collect the amounts that shall become due. And it would seem probable that the purchaser under one foreclosure may be liable for the second installment; for the lien of the second installment does not accrue until the assessment, warrant and diagram for the same are filed.

§ 642. **Same—Collection.**—Section 10 provides: "After said warrant, assessment, and diagram shall have been recorded, the same shall be delivered to the contractor, his agents or assigns, on demand, who shall thereby be authorized to demand and receive the amounts of the several assessments. In default whereof, and as regards enforced collections, interest, cost, and penalties, and the correction of errors, the same proceedings are to be had as are specified in sections 9, 10, 11, 12, 16, and 17 of an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March eighteenth, eighteen hundred and eighty-five, amended March fourteenth, eighteen hundred and eighty-nine." These sections are discussed in an earlier chapter.[22]

21 See ante, sec. 203 ff.

22 See ante, Part II, Chapter I, Divisions 4–6.

§ 643. **Jurisdiction of Council Over Hedges, etc.**—Section 11 provides: "The city council of every municipality in this state has jurisdiction of the hedges and fences placed by property owners along street lines, and may, by ordinance, prohibit the planting of thorn-bearing hedges and the use of barbed-wire along street lines, and may regulate the height, width, and the mode of trimming hedges, and enforce ordinances enacted for such purposes against absentees, or other negligent or recusant owners or occupants of lots or lands on which hedges are maintained. They may also condemn as public nuisances, any or all weeds whose seeds are of a winged or downy nature, and are spread by the winds, and may compel the eradication of such weeds by the owners of the lots whereon they grow, or at their expense."

§ 644. **Duty of City to Care for Trees.**—Section 12 provides: "The city council or trustees of every municipality shall provide for the replacement of missing trees, and for the trimming and care of all trees that have or shall have been planted for three or more years in the streets and highways, whether such planting shall have been done under this act or otherwise; the expense whereof must be defrayed out of the street fund, and the work be done by the superintendent of streets of such municipality."

CHAPTER VIII.

THE STREET LIGHTING ACT.

§ 645. Scope of the act.
§ 646. Resolution of intention.
§ 647. Time for hearing.
§ 648. Notice of hearing.
§ 649. Protests—Hearing and determination—Resolution ordering work.
§ 650. Limitations of action to contest assessment.
§ 651. Transmission of assessment to tax collector.
§ 652. Time for payment of assessment.
§ 653. Sale for nonpayment.
§ 654. Certificate of sale.
§ 655. Redemption from sale.
§ 656. Deed to purchaser.
§ 657. Tax collector to pay money collected to treasurer.
§ 658. Award of contract.
§ 659. Supplemental assessment.
§ 660. Refund of excess.
§ 661. Lien of the assessment.

§ 645. **Scope of the Act.**—In 1905, the legislature passed the Street Lighting Act, providing for the payment of the expense of installation and maintenance of street lights by a special assessment upon the district benefited. All cities are authorized to provide for street lighting, either by charter or by the Municipal Corporations Act. The special assessment provisions are the peculiar feature of the present act. Portions of the act were amended twice in 1911; and, of course, the later amendments are now in force. The general scope of the act is stated in section 1, which reads as follows: "Whenever the public interest or convenience may require, the city council of any municipality in the state shall have full power and authority to order poles, posts, wires, pipes, conduits and lamps, or any of said appliances, or any other suitable and necessary appliances, to be installed in and along the whole or any part of one or

more public streets, lanes, alleys, courts or places in such municipality, for the purpose of lighting the same; also to order any such appliances so installed or otherwise provided under this act, to be maintained; and also to order gas, electric current, or other illuminating agent, to be furnished for such lighting, in the manner and under the proceedings hereinafter described." The procedure follows, in a general way, that laid down by the Local Improvement Act of 1901.

§ 646. **Resolution of Intention and Report.**—The first step in the proceedings is the passage of a resolution of intention. Section 2 provides:

"Before ordering any improvement to be made, which is authorized by section one of this act, the city council shall adopt a resolution declaring its intention to do so, briefly describing the proposed improvement, which may include the whole or any part of one or more streets, lanes, alleys, courts or places, and specifying the exterior boundaries of the district to be benefited by said improvement and to be assessed to pay the cost and expenses thereof, and to be known as the assessment district; provided that the city council may, in its discretion, order, in said resolution of intention, that a certain portion or percentage of the cost and expenses of said improvement, the amount of which portion or percentage shall be specified in said resolution, shall be paid out of the treasury of the municipality, from such fund as the city council may designate. Said proposed improvement may include any or all of the different kinds of work mentioned in section 1 of this act; provided, however, that the maintenance of appliances or the furnishing of gas, electric current or other illuminating agent, shall be for a period stated in the resolution of intention, but not exceeding two years. The city council shall, also, in the same resolution, refer the proposed improvement to the city engineer, if there be one, and if not, to some competent person employed by the municipality for the purpose and

named in said resolution, and direct him to make and file with the clerk of the city council a report, in writing, presenting the following:

"1. Plans and specifications for the work required in order to make said improvements;

"2. An estimate of the cost of said improvement and of the incidental expenses in connection therewith;

"3. A diagram showing the district above referred to, and also the boundaries and dimensions of the respective subdivisions of the land within said district, each of which subdivisions shall be given a separate number in red ink upon said diagram;

"4. A proposed assessment of the total amount of the costs and expenses of the proposed improvement upon the several subdivisions of land in said district in proportion to the estimated benefits to be received by such subdivisions, respectively, from said improvement; provided, that whenever any portion or percentage of the cost and expenses of such improvement is ordered to be paid out of the treasury of the municipality, as hereinabove provided, the amount of such portion or percentage shall first be deducted from the total estimated cost and expenses of such improvement, and the assessment upon property, proposed in said report, shall include only the remainder of said estimated cost and expenses. Said assessment shall refer to such subdivisions upon said diagram by the respective red ink numbers thereof, and shall show the names of the owners, if known, otherwise designating them as unknown. No mistake in the name of the owner of any parcel of land shall affect the validity of the assessment thereon.

"In any municipality having a board of public works or other board or commission in charge of street lighting, created by charter or by law, the proposed improvement shall be referred to said board or commission and the report provided for herein shall be made by said board or commission."

more public streets, lanes, alleys, courts or places in such municipality, for the purpose of lighting the same; also to order any such appliances so installed or otherwise provided under this act, to be maintained; and also to order gas, electric current, or other illuminating agent, to be furnished for such lighting, in the manner and under the proceedings hereinafter described." The procedure follows, in a general way, that laid down by the Local Improvement Act of 1901.

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named in said resolution, and direct him to make and file with the clerk of the city council a report, in writing, presenting the following:

"1. Plans and specifications for the work required in order to make said improvements;

"2. An estimate of the cost of said improvement and of the incidental expenses in connection therewith;

"3. A diagram showing the district above referred to, and also the boundaries and dimensions of the respective subdivisions of the land within said district, each of which subdivisions shall be given a separate number in red ink upon said diagram;

"4. A proposed assessment of the total amount of the costs and expenses of the proposed improvement upon the several subdivisions of land in said district in proportion to the estimated benefits to be received by such subdivisions, respectively, from said improvement; provided, that whenever any portion or percentage of the cost and expenses of such improvement is ordered to be paid out of the treasury of the municipality, as hereinabove provided, the amount of such portion or percentage shall first be deducted from the total estimated cost and expenses of such improvement, and the assessment upon property, proposed in said report, shall include only the remainder of said estimated cost and expenses. Said assessment shall refer to such subdivisions upon said diagram by the respective red ink numbers thereof, and shall show the names of the owners, if known, otherwise designating them as unknown. No mistake in the name of the owner of any parcel of land shall affect the validity of the assessment thereon.

"In any municipality having a board of public works or other board or commission in charge of street lighting, created by charter or by law, the proposed improvement shall be referred to said board or commission and the report provided for herein shall be made by said board or commission."

The description of the work should be similar to that required in the resolution of intention under the Vrooman Act.[1] Inasmuch as no notice of the passage of the resolution is necessary, it is clear that there need be no designation of a newspaper. The provision for a description of the exterior boundaries of the district is imperative. A resolution which fails to set out the exterior boundaries is not sufficient to confer jurisdiction.[2] The provisions as to the contents of the report are of some benefit to owners liable to assessment, and must be followed.[3] We have discussed in a former chapter what may be contained in specifications.[4] The provisions for a map and for an assessment are similar to the requirements of the Local Improvement Act, already discussed.[5]

§ 647. **Time for Hearing.**—Section 3 provides: "Upon the filing of the report provided for in section two of this act, the said clerk shall present the same to the city council for consideration, and said council may modify the same in any respect, and, in case of any such modification, the report as modified shall stand as the report for the purpose of all subsequent proceedings. Thereafter the council, by resolution, shall appoint a time and place for hearing protests in relation to the proposed improvement, which time shall not be less than twenty days from the date of the passage of said resolution, and shall direct the clerk of the city council to give notice of said hearing, and shall designate the newspaper in which such notice shall be published." The contents of this resolution are clearly defined. The designation of the newspaper is jurisdictional.[6]

1 See ante, sec. 69 ff.
2 See ante, sec. 88.
3 Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.
4 See ante, secs. 120–128.
5 See ante, secs. 520–524.
6 See ante, sec. 90.

§ 648. Notice of Hearing.—Section 4 provides: "After the passage of the resolution mentioned in section three of this act, the clerk of said city council shall cause to be conspicuously posted along all streets and parts of streets within the assessment district described in the resolution of intention, at not more than three hundred feet in distance apart, notices (not less than three in all), of the passage of said resolution of intention and of the filing of said report. Said notices shall be headed 'Notice of Local Improvement,' in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said resolution of intention and of the filing of said report, and the date set for the hearing of said protests, and briefly describe the improvement proposed, and refer to said resolution and report for further particulars. He shall also cause a notice similar in substance to be published for a period of two days in a daily newspaper published and circulated in said municipality, and designated by said city council for that purpose, or if there is no daily newspaper in said municipality, then by two successive insertions in a weekly paper, so published, circulated and designated. Said notices must be posted and published, as above provided, at least ten days before the date set for the hearing of said protests." This corresponds, in general, to the provisions of section 3 of the Vrooman Act for notice of the resolution of intention. The rules relating to such notices under that act are, in the main, applicable here.[7] It is to be noted, however, that under this act notices are to be posted along all streets within the assessment district.

§ 649. Protests — Hearing and Determination — Resolution Ordering Work.—Section 5 provides:

"Any person interested, objecting to said improvement, or to the extent of the assessment district, or to the proposed assessment provided for in section two of this act,

[7] See ante, secs. 92–96.

may file a written protest with the clerk of the city council at or before the time set for the hearing referred to in section three hereof. The clerk shall indorse on every such protest the date of its reception by him, and at the time appointed for the hearing above provided for, shall present to said city council all protests so filed with him. If such protests are against said improvement and said city council finds that the same are signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district, all further proceedings under said resolution of intention shall be barred and no new resolution of intention for the same improvement shall be passed within six months after the presentation of such protests to the city council, unless the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district shall in the meantime petition therefor. If such protests are against the improvement and the council finds that they are not signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district, or if such protests are against the extent of the assessment district, the council shall hear said protests at the time appointed therefor, as above provided, or at any time to which the hearing thereof may be adjourned, and pass upon the same, and its decision shall be final and conclusive, and if such protests are sustained the proceeding shall be abandoned, but may be renewed at any time, and if such protests are denied, the proposed assessment shall be confirmed. If such protests are against the proposed assessment, the council shall hear said protests at the time appointed therefor as above provided, or at any time to which the hearing thereof may be adjourned, and may confirm, modify or correct said proposed assessment.

"When, upon the hearing, said proposed assessment is confirmed, modified, or corrected, or in case no protests are

filed, the report provided for in section 2 hereof shall be adopted as a whole, with any modifications or corrections that have been made therein, and the city council shall by resolution order said proposed improvement to be made, and declare its action upon said report and assessment, which resolution shall be final and conclusive on all persons, and the assessment shall be thereby levied upon the respective subdivisions of land in the assessment district."

Two classes of protest are here provided for: (1) Against the improvement; (2) against the extent of the district. A majority protest against the improvement has practically the same effect as the similar protest under the Vrooman Act.[8] A hearing is necessary, however, where the protest is not signed by a majority. The protest against the extent of the district is practically the same as the similar objection under the Vrooman Act.[9] A hearing must be had. The decision of the council is final and conclusive; but only as to matters which it has jurisdiction to decide.[10]

§ 650. **Limitations of Action to Contest Assessment.**— Section 6 provides: "The validity of an assessment levied under this act shall not be contested in any action or proceeding unless the same is commenced within thirty days after the time said assessment is levied, and any appeal from a final judgment in such an action or proceeding must be perfected within thirty days after the entry of such judgment." This is similar to section 9 of the Local Improvement Act of 1901, which has already been discussed.[11]

§ 651. **Transmission of Assessment to Tax Collector.**— Section 7 provides: "Upon the passage of the resolution provided for in section 5 hereof, the clerk of said city council shall transmit to the tax collector of the municipality

[8] See ante, sec. 105.
[9] See ante, sec. 113.
[10] See ante, secs. 251–263.
[11] See ante, secs. 534, 535.

the diagram and assessment provided for in subdivisions 3 and 4 of section 2 hereof, and any modifications or corrections thereof made by said city council."

§ 652. **Time for Payment of Assessment.**—Section 8 provides: "Upon the receipt of the diagram and assessment referred to in the last preceding section, the tax collector of the municipality shall record the same in a substantial book, to be kept for that purpose, in his office, and shall thereupon fix a day not less than twenty, nor more than thirty, days from the date of the receipt by him of said diagram and assessment after which all assessments unpaid shall become delinquent and ten per cent shall be added to the amount thereof, and shall also fix a day for the sale of the various parcels of land within said district upon which the assessments are unpaid, which said date shall not be less than fifty days nor more than sixty days from the date of the receipt by him of said diagram and assessment." This is somewhat similar to the corresponding provisions of the Local Improvement Act of 1901.[12]

§ 653. **Sale for Nonpayment.**—Section 9 provides: "Notice of the sale of property upon which the said assessments are delinquent shall be given by said tax collector in the manner now provided by the general laws of the state of California, for the giving notice of the sale of real estate upon execution, provided, however, that the descriptions of the various parcels of land need not be set out at length, but only by the respective numbers of the same as they appear upon the assessment and diagram, which shall be properly referred to in said notice, and said descriptions shall all be contained in one notice. At the time and place fixed for the sale of said property, the tax collector shall separately sell the respective parcels of land within said district, the assessments against which have not been paid, or

[12] See ante, sec. 537.

so much of each parcel as shall be necessary to realize the amount assessed against said parcel, said ten per cent penalty for delinquency, and its proportion of the expenses of sale, in the order of their numbers upon said diagram. At said sale the municipality may be a purchaser."[13]

§ 654. **Certificate of Sale.**—Section 10 provides: "The tax collector shall issue for each sale an original and a duplicate certificate of sale, referring to the proceedings, describing the parcel sold, and giving the name of the purchaser and the amount for which said parcel was sold. The original certificate he shall deliver to the purchaser, and the duplicate he shall keep on file in his office in the form of a stub in the certificate book." A compliance with the statutory provisions as to the certificate of sale and its contents is essential to the validity of the sale.[14]

§ 655. **Redemption from Sale.**—Section 11 provides: "At any time before the expiration of one year from the date of the sale, any property sold under the provisions of the preceding sections may be redeemed by the payment to the tax collector of the amount for which the property was sold, with an additional penalty of twenty-five per cent of said amount. Said redemption money shall be paid by the tax collector to the person holding the original certificate of sale upon his delivering up the same and receipting for the amount received from the tax collector therefor. Upon redemption of any parcel of land the tax collector shall enter the fact and date of such redemption upon the duplicate certificate of sale thereof."

§ 656. **Deed to Purchaser.**—Section 12 provides: "If the property is sold, and is not redeemed within said period of one year from the date of the sale, the tax collector shall

[13] Compare the corresponding provisions of the Local Improvement Act of 1901, ante, sec. 539.

[14] See Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

execute to the person named in the original certificate, or to his assignee, a deed of the property described in said certificate, which said deed shall refer in general terms to the proceedings under which the same is issued, and shall contain a description of the property. Such deed shall convey title in fee to said property, and the grantee is immediately, upon the receipt thereof, entitled to possession of the property described therein." The deed, as well as the certificate of sale, must contain the matters prescribed by the statute.[15] It is to be noted that this act does not make the deed prima facie evidence of the regularity of the proceedings. Hence it is necessary to prove their regularity in order to show title.

§ 657. **Tax Collector to Pay Money Collected to Treasurer.**—Section 13 provides: "The funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment, or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said municipality, who shall place the same in a special fund designated by the number or name of the proceeding, and payments shall be made out of said special fund only for the purposes provided for in this act. To expedite the making of any such improvement, the city council may at any time transfer into said special fund, out of any money in the general fund, such sums as it may deem necessary, and the sums so transferred shall be deemed a loan to such special fund and shall be repaid out of the proceeds of the assessments provided for in this act."

§ 658. **Award of Contract.**—Section 14 provides: "At any time after the funds for the work, or any part of the work, shall be in the hands of said treasurer, the city council may let the contract or contracts for such work, or the respective parts thereof. Every such contract shall be let to

[15] See post, sec. 711 ff.

the lowest responsible bidder after notice published by two insertions in some newspaper published in such municipality, and designated by the city council for that purpose, or if there be no such newspaper, then by such posting as the city council may provide. Every bid shall be accompanied by a certified check, amounting to ten per cent of the bid, payable to the order of the clerk of said city council, and the same shall be forfeited to the municipality in case the bidder depositing the same does not, within fifteen days after written notice that the contract has been awarded to him, enter into a contract with the municipality for the work, the faithful performance of which shall be secured by an undertaking in such penal sum as the city council shall require, with sureties satisfactory to said council. The contract must provide that the work shall be done, and the work must be done, strictly in accordance with the plans and specifications contained in the report provided for in sections 2 and 3 of this act. The work must be done under the supervision of the board, officer or person by whom the report provided for in section 2 of this act was made, and no work shall be paid for until it has been accepted by said board, officer or person. If the contractor abandons the work, or fails to proceed with the same as rapidly as required by his contract, the said city council may relet the work in the same manner as in the case of the first letting thereof, and retain the amount of the cost of the same, and of any expense incidental to the reletting out of any funds due, or to become due, to the contractor, and also hold him and his sureties responsible for such cost and expense, and for any damages resulting from such abandonment or failure upon his bond; provided, however, that the city council, in its discretion, may, at any time within ten days after the award of any contract, as above provided, or at any time within ten days after the time fixed for the opening of bids, if no bids have been received, order by resolution adopted by a vote of two-thirds of all its mem-

bers, that said proposed contract be not made, and that the municipality itself execute the work embraced therein, in accordance with the plans and specifications adopted for such work, and employ the labor, and provide the material, appliances, supplies and illuminating agent necessary therefor; and the cost and expenses of such work shall be paid out of the aforesaid funds; and provided further, that the amount appropriated and used from said funds for said purpose shall not exceed the amount of the bid upon which the award of contract aforesaid was made or if no bids have been received and the work is to be executed by the municipality itself as herein provided, such cost and expense shall not exceed the amount of the estimate thereof provided for in section 2 of this act; and if such cost and expense shall exceed the amount of said bid, or of said estimate in case no bids are received, then such excess shall be met out of any moneys in the general fund in the treasury of said city."

§ 659. **Supplemental Assessment.**—Section 15 provides: "In case the first assessment for any improvement provided for in this act proves insufficient, a supplemental assessment may be made to raise the deficit, in the same manner as nearly as may be, as the first assessment, except that protests may only be made against such supplemental assessment, and so on until sufficient money shall have been realized to pay for such improvement."

§ 660. **Refund of Excess.**—Section 16 provides: "If at any time an assessment for any such improvement shall realize a larger sum than is necessary therefor, the excess shall be refunded pro rata to the parties by whom it was paid."

§ 661. **Lien of the Assessment.**—Section 17 provides: "Every special assessment levied under this act shall, from

the date of the levy thereof, be a lien upon the land upon which it is levied paramount to all other liens, except prior assessments and taxation, and such lien shall continue until such special assessment is paid, or until the property is sold and a deed is made therefor to the purchaser as hereinbefore provided, and all parties shall have constructive notice of such lien from the date of the passage of the resolution referred to in section 5 thereof."

PART III.
THE STREET OPENING ACTS.

CHAPTER I.
THE STREET OPENING ACT OF 1889.

§ 662. In general.
§ 663. Nature of the act.
§ 664. Effect of charter provisions.
§ 665. Procedure is not exclusive.
§ 666. Constitutional right of owner not to have property taken without compensation.
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§ 695. Report of commissioners.
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§ 699. Objections to the report.
§ 700. Time for hearing, and objections.
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§ 704. Same—Payment—Delinquency.
§ 705. Same—Application of general laws.
§ 706. Same—Delinquent list.
§ 707. Same—Notice of sale.
§ 708. Same—Affidavit of publication.
§ 709. Same—Manner of conducting sale.
§ 710. Same—Same—Statutory provisions must be followed.
§ 711. Same—Certificate of sale.
§ 712. Same—Same—Form and contents.
§ 713. Same—Redemption.
§ 714. Same—Notice of application for deed.
§ 715. Same—Same—Contents.
§ 716. Same—Same—Mode and proof of service.
§ 717. Same—Deed.
§ 718. Same—Effect of deed as evidence.
§ 719. Payment of funds to treasurer.
§ 720. Notice of payment of damages.
§ 721. Title can be obtained only by voluntary conveyance or suit.
§ 722. City is entitled to deed from owner.
§ 723. What title is to be acquired.
§ 724. Eminent domain proceedings—In general.
§ 725. Same—Complaint.
§ 726. Same—Defenses.
§ 727. Same—Legislative declaration of public use conclusive.
§ 728. Same—Evidence of necessity.
§ 729. Same—Compensation for property taken.
§ 730. Same—Compensation for property damaged.
§ 731. Same—Consideration of benefits.
§ 732. Same—Costs.
§ 733. Same—Right to possession before actual payment of damage.
§ 734. Payment of judgment.
§ 735. Payment of warrants.
§ 736. Supplemental assessment.
§ 737. Procedure in case of defective title.
§ 738. Payment of expenses out of city funds.
§ 739. Continuation of prior proceedings.
§ 740. Remedies of owners.

§ 662. **In General.**—The Street Opening Act of 1889 is the first general act for street opening passed since the adoption of the constitution of 1879. It differs in some material respects from the earlier acts, most of which were of local application.[1] For instance, some of the earlier acts required a petition by the property owners as a prerequisite to ordering the work done.[2] The provision in the new constitution requiring compensation to be made for property damaged for public use required provision to be made in this act for ascertaining such damage. An attempt was made by the Street Opening Act of 1893 to limit this act to cities of less than forty thousand; but as it is generally conceded that the act of 1893 is unconstitutional, this act is considered as applicable to all cities except those with valid charter provisions.[3] The act was not amended until 1909, and then section 9 was slightly changed. It is not affected by the Street Opening Act of 1903, which establishes an alternate procedure;[4] nor by the enactment in 1907 of amendments to the Code of Civil Procedure relative to eminent domain.[5]

§ 663. **Nature of the Act.**—The Street Opening Acts are in reality twofold. They provide for the taking and damaging of property for public use, which depend upon the right of eminent domain. They provide also for levying assessments upon property benefited to pay the expenses, which depend upon the power of taxation.[6] The rules relating to the two governmental powers are not altogether the same. There may, therefore, be a fatal defect in the assessment proceedings, while the order for the opening of the

1 See City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

2 See Mulligan v. Smith, 59 Cal. 206.

3 See post, secs. 741–743.

4 Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

5 Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

6 For a good discussion of the distinction, see Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

street may be valid. The two proceedings, although combined in one, are in reality separate.

§ 664. **Effect of Charter Provisions.**—Street opening, as well as street improvement, is a municipal affair. Hence, a charter provision adopted since the constitutional amendment of 1896 will control.[7] Likewise, a charter provision adopted prior to the adoption of the Street Opening Act of 1889 became operative by the adoption of the amendment of 1896, and now controls.[8] It follows that where a charter provides a valid procedure, a proceeding under the general law is void and confers no rights.[9]

§ 665. **Procedure is not Exclusive.**—"The provisions of the act of March 6, 1889, are not exclusive, and were not designed to prohibit a municipality from maintaining condemnation proceedings under the provisions of the Code of Civil Procedure. It may and will usually happen that a municipality proposing to open a new street will adopt the machinery provided for by the statute, if for no other reason than that it contemplates the formation of an assessment district, and the imposition of the cost of the opening of the street upon the property of that district. But, upon the other hand, if it shall happen that a municipality has in its treasury funds available for the proposed condemnation and opening of a street, no good reason can be seen why it should not pay these expenses out of its treasury and relieve property owners of the unnecessary burden of taxation."[10]

[7] See post, sec. 806. See Sinton v. Ashbury, 41 Cal. 525.

[8] Bryne v. Drain, 127 Cal. 663, 60 Pac. 433; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352. These cases apply to the city of Los Angeles. For the rule prior to the constitutional amendment of 1896, see Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[9] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

[10] City of Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34; City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

§ 666. Constitutional Right of Owner not to Have Property Taken Without Compensation.—"The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: 1. The right to compensation; and 2. The right to have that compensation made or paid into court before his property is taken or injuriously affected. Either or both of these rights he may waive; that is to say, he may waive his right to any compensation, or he may waive his right to prepayment of compensation. But where there is no such waiver, the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them."[11]

§ 667. Constitutionality of the Act—In General—Title. This act is constitutional.[12] It has been attacked on numerous constitutional grounds, other than the general objections always urged against special assessment statutes. We shall consider here only the matters applicable specially to this act. In the first place, it has been urged that it is unconstitutional so far as it gives authority to assess property, because the subject of assessments is not included in the title of the act. Upon this point, the Supreme Court has said: "The title of the act is as follows: 'An act to provide for laying out, opening, extending, widening, straightening, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or

[11] Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307. In general, see People v. Kruger, 19 Cal. 411; Colton v. Rossi, 9 Cal. 595.

[12] In general, see ante, secs. 6–14. See, also, Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. The act has been held constitutional in Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377; City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

convenient for that purpose.' We think this point is not well taken. The subject of the act, and the whole one, is the laying out, opening, extending, widening, straightening, or closing up streets, squares, lanes, alleys, and courts, or places, and all of the provisions of the act relating to the condemnation of lands, and assessment of other lands to pay therefor, are the means by which this one object of the statute is to be accomplished. Therefore the title of the act, instead of containing less than is necessary, contains more than the constitution requires."[13]

§ 668. **Same—Other Objections.**—The statute does not deprive persons of property without due process of law because the notice provided is not personal. "The legislature has the undoubted right to say what notice shall be given in this class of cases, so long as the notice required to be given is reasonable, and the proceeding is not arbitrary, oppressive, or unjust, and the notice provided for need not be a personal one."[14] The fact that the assessment is levied before the work is done does not affect the validity of the statute;[15] nor does the fact that the expenses incurred and the amount assessed may not correspond exactly.[16] The fact that the procedure for acquiring the property may not be valid does not affect the provisions of the act relating to assessments.[17] Again, the statute is not open to the objection that it delegates to a special commission the power to perform municipal functions. "The commissioners are simply made the agents of the municipalities to assist them in opening streets. They act under the direction of the city authorities, and their acts are not binding or effective until

[13] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. See, also, Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

[14] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. See, also, Lent v. Tillson, 72 Cal. 404, 14 Pac. 71.

[15] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[16] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[17] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

the same are approved and confirmed by the city council. Therefore, the act done is the act of the city, at last, and not of the commissioners."[18] Again, the act is not open to the objection that it is not a general law.[19] The fact that eminent domain proceedings are provided for in the Code of Civil Procedure does not make this act of local application. It does not deny the equal protection of the law.[20]

§ 669. **Scope of the Act—Jurisdiction.**—Section 1 states the general jurisdiction of the council in the matter of opening streets. "Whenever the public interest or convenience may require, the city council of any municipality shall have full power and authority to order the opening, extending, widening, straightening, or closing up in whole or in part of any street, square, lane, alley, court, or place within the bounds of such city, and to condemn and acquire any and all land and property necessary or convenient for that purpose." This confers upon the council the absolute authority to decide when the public interest requires any of the work mentioned. The action of the council in so deciding is legislative and not judicial. Hence it cannot be reviewed on certiorari.[21]

§ 670. **Act Does not Authorize Improvement of Street.**—This act does not authorize the improvement of the street,

[18] Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. In general, as to the constitutionality of the act, see City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[19] Clute v. Turner, 157 Cal. 73, 106 Pac. 240 (an excellent discussion); Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[20] Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

[21] Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; Symons v. City and County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

"The power to lay out or change streets is in its nature legislative and not judicial. The legislature may itself perform those acts, or it may select such agencies for that purpose as it deems proper": De Witt v. Duncan, 46 Cal. 343.

as well as opening. "A consideration of the entire act shows that the assessment which is authorized to be made upon the district defined in the resolution of intention is to be limited to the cost of the lands and improvements to be taken or damaged, and the expenses that the commissioners are by the act authorized to incur in effecting the widening of the street."[22] "The term 'opening' refers to the throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface."[23]

§ 671. **Vacation of Street—Right to Compensation.**—Prior to the adoption of the constitutional provision prohibiting the damaging of property for public use without compensation, it was held that the legislature might vacate or authorize the vacation of a street without providing compensation to owners whose property was injured thereby.[24] Under the new provision, this cannot be done. "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. When a city subdivides a tract of land of which it is the owner into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purpose of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or sub-

22 Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988.

23 Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988, quoting Reed v. City of Toledo, 18 Ohio, 161.

24 See Polack v. San Francisco Orphan Asylum, 48 Cal. 490; Brook v. Horton, 68 Cal. 554, 10 Pac. 204. Compare City and County of San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482.

stantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has the fee in the street or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief."[25]

§ 672. **Same—When Compensation must be Paid.**—"The vacation of a highway, when duly and legally effected, involves something more than a mere constructive closing which would leave the street still a street, but no longer subject to municipal control. It involves a physical closing as well, which entitles the owners of the soil once occupied by the highway to take full and complete possession of their land." It is not essential, however, that the statute provide for payment of compensation before the street is declared closed. "It would matter little whether the authorities first compensated the property owners and then declared the alley closed, or first declared it closed and then made compensation, provided it be distinctly understood that in the latter case no rights attach or are lost, no invasion of the property rights of a nonconsenting owner may be worked, and no substantial impairment of his easement result until compensation has been made to him in the constitutional mode. In other words, the sequence of the acts becomes immaterial, saving that as against nonconsenting property owners the ordinance of vacation is without force

[25] Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307. In general, as to the right of an abutting owner to damages upon the vacation of a street, see 46 Am. St. Rep. 493, note. As to his remedies, see 101 Am. St. Rep. 117, note.

or validity to work the taking or damaging of their property until compensation has been made to them."[1]

§ 673. **Diminishing Width of Street.**—This statute authorizes the closing of a street in whole or in part. This includes the narrowing of a street. In such a case, the abutting owners are not entitled to object merely because their property is rendered less valuable. "The provision in the constitution was inserted therein to provide for instances in which property was not taken from the possession of the owner, or into physical occupancy by the public, and applies only to such damages as may be recoverable under established rules of law. The damage which the appellants may sustain by reason of a diminution in value of their lands is not damage for which they are entitled to compensation."[2] An owner is entitled to damages for narrowing a street only where his enjoyment of light and air, or his right of access, is impaired. The fact that a reduction of the width of a street will give title to certain abutting owners does not impair the jurisdiction of the council.[3]

§ 674. **Outline of the Procedure.**—In outline, the procedure under this act is as follows: (1) The council must pass a resolution of intention. (2) Notice thereof must be given by posting and publication. (3) Objections may be made within ten days after the expiration of the time of publication. The council must fix a time for hearing, notice thereof must be given, and a hearing must be had. The action of the council upon the objections is conclusive. (4) The council must order the work to be done, and unless the work is closing a street, must appoint commissioners. (5) The commissioners file a report, awarding damages and assessing benefits. (6) Notice of the filing of the report must be given and objections may be filed. A hearing

1 Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 207.
2 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.
3 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

thereon must be had. (7) The council then approves the report and orders the work done. (8) The city clerk then forwards the report to the street superintendent, and the report becomes the assessment-roll. (9) The superintendent of streets then gives notice and proceeds to collect the assessments, selling property upon which assessments become delinquent. (10) When sufficient money is on hand, the commissioners notify the owners of property to be taken, and such owners may obtain the compensation awarded upon tendering a deed. (11) If they refuse to accept the proffered compensation, the city may proceed to condemn the property under the eminent domain statutes. There are also provisions for supplementary assessments, and for a procedure when title is found defective.

§ 675. **Resolution of Intention—In General.**—The first step in the proceedings is the passage of a resolution of intention. Section 2 provides: "Before ordering any work to be done or improvement to be made which is authorized by section 1 of this act, the city council shall pass a resolution declaring its intention to do so, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost, and expenses thereof." In many respects this resolution is similar to the resolution of intention under the Vrooman Act. Hence the reader should consult the chapter dealing with that act.[4] The resolution of intention is jurisdictional; and upon its validity the validity of all the subsequent proceedings depends.[5] In addition to the matters prescribed, it should contain a designation of the newspaper in which notices of the work are to be published. Although this may be contained in a separate resolution, it is customary and

[4] See ante, sec. 64 ff.

[5] Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988.

the better practice to include it in the resolution of intention.[6]

§ 676. **Same—Description of District to be Assessed.**—The description of the district to be assessed must give the exterior boundaries. Accordingly, a description of the district as "all lots and parcels of land fronting on each side of First street, from the west side of Los Angeles street to the west line of Alameda street," is insufficient, because there is nothing to indicate the extent of the district in either direction from First street. In discussing this, the Supreme Court said: "A very obvious reason for this requirement of the statute is, that each owner of property within the district may be informed of the extent of territory which is to bear the burden of the improvement, and thus, by calculating the relative burden upon himself, determine whether the burden to be borne by himself will be so disproportionate to the benefit of the improvement that he can make suitable representations to the city council when it comes to act upon the ordinance in pursuance of its resolution of intention. While each owner of property may know the depth and area of his own lot within the district, he is not presumed to know that of the other lot owners, and consequently cannot know the relative proportion of the expense which he will be called upon to bear, and cannot intelligently make any objections before the council" to the extent of the district.[7] The fact that the district does not include all the land benefited is immaterial. The only remedy for failure to include benefited land is by filing objections with the council.[8]

§ 677. **Same—Description of Land to be Taken.**—The resolution of intention must describe the lands necessary to

[6] See ante, sec. 90.

[7] Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

[8] United Real Estate & Trust Co. v. Barnes (Cal.), 113 Pac. 167 (decided Jan. 11, 1911).

be taken; but it is not necessary that the lands to be taken be capable of ascertainment from the description in the resolution without other reference. Thus, a description by metes and bounds "excepting therefrom all land now held by said city, or the people of said state, as open ways," is sufficient. In passing upon this, the Supreme Court said: "The main object of requiring a description of the land to be taken is to define the location of the improvement and to give information to the owners of the land which is to be taken, as well as to those within the district to be assessed therefor of the intended improvement. By this notice the owners of the land which is to be taken can determine whether to assent or object to the same, and the owners of the lands to be assessed therefor have the opportunity to object also to the extent of the district to be assessed therefor. The city council determines in the first instance whether the public interest demands the opening of the street, in view of the demand for such thoroughfare at that place, and without any regard to the ownership of the land within the proposed lines of the street. If, as a matter of fact, a portion of the land within these boundaries has already been appropriated to public use, or is held by the city or state as open ways, the land deemed necessary to be taken is sufficiently described by designating in the resolution the outer lines of the proposed improvement, without any mention of such open ways, or by excepting the same, without describing the exceptions. In either case the parties to be affected by the proposed improvement are fully notified of every fact necessary for the protection of their interests."[9]

§ 678. **Notice of Intention—How Posted.**—Section 3 provides for posting and publication by the street superintendent in practically the same manner as prescribed in section 3 of the Vrooman Act. Under the present act, how-

[9] Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377.

ever, there is no requirement of posting or publication of the resolution itself. Section 3 provides that "the street superintendent shall then cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of the resolution." Under the Vrooman Act it is held that the entire street is the line of the improvement, and that the notices are to be not more than one hundred feet in distance apart measured longitudinally.[10] The courts have not decided what the line of improvement is under this act; but if the same interpretation is given, it means along the line of the property to be taken. This may, and frequently will, require the street superintendent to go upon private property to post the notices; and in cases where the property is covered by a large building, such posting may be almost a physical impossibility. The statute does not prescribe when the posting must be done. Of course it cannot be done before the resolution is passed; but there is no express limitation other than that.[11] The fact that this does not provide for personal service does not impair the validity of the statute.[12]

§ 679. **Same—Publication.**—In addition to posting, the superintendent of streets must also publish notice. "He shall also cause a notice, similar in substance, to be published for a period of ten days in one or more daily newspapers published and circulated in said city, and designated by said city council; or if there is no daily newspaper so published and circulated in said city, then by four successive insertions in

10 Pepper v. Neiman, 4 Cal. App. 55, 87 Pac. 286. See, also, ante, sec. 95. It is also held, under the Vrooman Act, that the notices must be posted along the entire line, although certain parts have been excepted: Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 Pac. 141.

11 See Porphyry Pav. Co. v. Ancker, 104 Cal. 340, 37 Pac. 1050.

12 Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771; Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

a weekly or semi-weekly newspaper, so published, circulated, and designated." It is essential that the newspaper be designated by the council before the publication begins.[13] It is customary to insert the designation in the resolution of intention, although this is not essential.[14] A publication without such designation, or in a newspaper other than that designated is of no avail, and gives the council no jurisdiction to proceed.[15] The question of the sufficiency of publication has been considered in another chapter.[16]

§ 680. **Same—Contents.**—The contents of the notice must be as follows: "Said notice shall be headed 'Notice of Public Work,' in letters not less than one inch in length, shall be in legible characters, state the fact of passage of the resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution for further particulars." These requirements are practically the same as those for the superintendent's notice under the Vrooman Act, and what has been said as to the contents of that applies here.[17] The notice is sufficient if it is precise as to the facts required by the statute, accurately describes the portion of the street to be improved, and contains such brief description of the work as, with the reference to the resolution, will inform all parties as to the work proposed.[18] It is not necessary to set out the resolution in full. The superintendent may, however, recite the resolution in full in the notice.[19] It is no objection to a notice that it gives more information than the statute requires. In cases where the entire resolution is set

[13] See ante, sec. 90.
[14] See ante, sec. 90.
[15] See ante, sec. 90.
[16] See ante, secs. 90, 97.
[17] See ante, sec. 94.
[18] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585.
[19] McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924; Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

forth, it is not necessary to refer to the resolution on file for further particulars.[20]

§ 681. **Protests—In General.**—Section 4 provides for protests. "Any person interested objecting to said work or improvement, or to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after expiration of the time of the publication of said notice, which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him." No particular form of protest is required. It does not create a burden or obligation, and hence need not be executed with the ceremonies required for a transfer of real estate, or for creating a charge thereon.[21] A protest will not be strictly construed.[22] The time for making objections is prescribed as "within ten days after the expiration of the time of publication." These words will probably be construed to mean not beyond that time.[23] Two classes of protests are provided for: (1) By any person interested objecting to the work. This includes both owners of property to be assessed and owners of property to be taken. It amounts to a protest against doing the work. (2) By any person interested, objecting to the extent of the district. While this is not limited to owners who are liable to assessment, as a practical matter they are the only ones really interested. The statute requires that the clerk indorse the date of filing. It is not incumbent upon the protestants, however, to see that this is done. They do all that is re-

20 Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

21 Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535 (a Vrooman Act case).

22 City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666 (a Vrooman Act case).

23 See Thomason v. Carroll, 132 Cal. 148, 65 Pac. 262.

quired of them when they file the protest.[24] The question of the form of protests and of the rules relating thereto are more fully discussed in an earlier chapter.[25]

§ 682. **Same—Time of Hearing.**—The clerk must "at the next meeting of the city council after the expiration of said ten days lay said objections before said city council, which shall fix a time for hearing said objections not less than one week thereafter." The language is obscure, but the meaning evidently is that the time set must be at least one week thereafter. "The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to such objector." Section 5 provides that "at the time specified or to which the hearing may be adjourned, the said city council shall hear the objections urged, and pass upon the same." The hearing must not commence before the time set. An adjournment had before the time set operates to devest the council of jurisdiction to hear the objections urged without a new notice.[1] The right to the

[24] City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666. See, also, ante, sec. 103.

[25] See ante, sec. 99 ff.

[1] Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

In this case the court said: "The only meeting held by the council on that day was more than one hour previous to the noticed hearing, and for what purpose it then met is not shown. It was, we suppose, a regular meeting, and may be conceded to have been called for regular business, but the meeting to consider objections was called for 9:15, and we do not think that that business could have been transacted at 8 P. M., without notice to and without the consent and in the absence of such interested parties; nor could the council at 8 P. M., without notice to and without the consent and in the absence of such interested parties, adjourn a hearing fixed for the hour of 9:15 P. M. It was the duty of Mr. McDonald, the sole attending councilman, to remain at the council chamber until the hour fixed by the council for this hearing, namely, 9:15 P. M. Had he done this his action in adjourning the hearing at that time would have given actual notice to plaintiff, who was there and then in attendance; and if plaintiff had not been present he could not be heard to complain of an adjournment of the hearing

notice provided for herein is absolute. A hearing without notice is a nullity, and proceedings had thereafter are of no effect.[2]

§ 683. **Same—Effect of Failure to Protest.**—A failure to protest is a waiver of such objections as might have been passed upon by the council at the hearing. These matters, as we have seen, are practically limited to the necessity for the work and the extent of the district. Upon these matters, section 5 makes the decision of the council final and conclusive.[3] Its decision, however, does not overcome any jurisdictional defect in the proceedings. It is not necessary for an owner to make any objection arising out of such a defect; and, of course, he waives nothing by failing to make it.[4] Again, the fact that he does make such an objection which is overruled by the council does not constitute a waiver, nor estop him from setting up the same defect in the courts.[5]

§ 684. **Same—Determination.**—The effect of the protest depends entirely upon the council. Section 5 provides: "If such objections are sustained, all proceedings shall be stopped, but proceedings may be again commenced at any time by giving notice of intention to do said work or make said improvement. If such objection is overruled by the

of which he had due notice. Plaintiff was not bound to make inquiry from the clerk as to what had taken place at some previous hour of the day by the council, and had he done so, as we have seen, it would not have enlightened him. As we view the matter, the session held at 8 o'clock (if it can be called a session) had no power to act upon plaintiff's objections at that hour, and the council got no greater power by the adjournment than it had at the hour it adjourned."

[2] Id.

[3] Thus, an objection that property benefited has been omitted from the district is waived by a failure to protest: United Real Estate & Trust Co. v. Barnes (Cal.), 113 Pac. 167 (decided January 11, 1911).

[4] Dehail v. Morford, 95 Cal. 457, 30 Pac. 593. See, also, Mulligan v. Smith, 59 Cal. 206.

[5] Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

city council, the proceedings shall continue the same as if such objection had not been made. At the expiration of the time prescribed during which objections to said work or improvement may be made, if no objection shall have been made, or if an objection shall have been made, and said council, after hearing, shall have overruled the same, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvements to be made, which is authorized by section 1 of this act." While the council may commence new proceedings immediately after sustaining a protest, it cannot rescind its action sustaining the protest and continue the proceedings. In other words, it cannot give a new trial.[6]

§ 685. **Resolution Ordering Work—Appointment of Commissioners.**—Section 6 provides: "Having acquired jurisdiction as provided in the preceding section, the city council shall order said work to be done, and unless the proposed work is for closing up, and it appears that no assessment is necessary, shall appoint three commissioners to assess benefits and damages, and have general supervision of the proposed work or improvement until the completion thereof in compliance with this statute." Whether the commissioners must be appointed at the same time and as a part of the resolution ordering the work is questionable;[7] but it is certainly better practice to name the commissioners in the resolution. In regard to closing streets, the Supreme Court has said: "The proper construction to be given to this provision is that commissioners are not to be appointed if the proposed improvement is for closing up the whole or a part of the street unless an assessment is necessary, and that the necessity of an assessment is to be determined by the board, and may be determined irrespective of any

[6] See ante, sec. 262.

[7] This question was raised in Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82, but the case was decided on other points.

previous notice therefor, or after such hearing and investigation as it may deem appropriate. There can be no assessment necessary unless there is some damage for which an assessment is to be made, and, in the absence of a showing that damage will result from the closing up of the street, the board is authorized to hold that an assessment is not necessary. This provision necessarily means that the board must in the first instance determine whether an [assessment] is necessary, but its jurisdiction to order the improvement does not depend upon a correct determination by it of that question. The board is not authorized to determine the amount of damage which may be caused by the improvement, but it is authorized in the exercise of its legislative discretion to determine in the first instance whether any damage will result."[8]

§ 686. **Conditions of Employment of Commissioners.**—Section 6 then provides for the conditions of employment of the commissioners. "For their services, they shall receive such compensation as the city council may determine from time to time; provided, that such compensation shall not exceed two hundred dollars per month each, nor continue more than six months, unless extended by order of the city council. Such compensation shall be added to and be chargeable as a part of the expenses of the work or improvement. Each of the said commissioners shall file with the clerk of the city council an affidavit, and a bond to the state of California, in the sum of five thousand dollars, to faithfully perform the duties of his office. The city council may at any time remove any or all of said commissioners for cause, upon reasonable notice and hearing, and may fill any vacancies occurring among them for any cause." There is no requirement that the commissioners be disinterested parties. The fact that they are interested neither works a fraud upon other owners nor is against public

[8] Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

policy. If their actions are improper, they may be remedied by the council upon objections being made to the report.[9]

§ 687. **Powers of Commissioners.**—Section 7 provides: "Said commissioners shall have power to employ such assistance, legal or otherwise, as they may deem necessary and proper; also to rent an office, and provide such maps, diagrams, plans, books, stationery, fuel, lights, postage, expressage and incur such incidental expenses as they may deem necessary." A wide discretion is conferred by this section. It can be limited, apparently, only by the council restricting the amount of the assessment. Of course, in case of a grave abuse, the commissioners may be removed from office, under the terms of section 6. It is customary for the commissioners to appoint a secretary, and frequently an attorney.

§ 688. **All Expenses Chargeable to Special Fund.**—Section 8 provides: "All such charges and expenses shall be deemed as expenses of said work or improvement, and be a charge only upon the funds devoted to the particular work or improvement, as provided hereinafter. All payments, as well for the land and improvements taken or damaged, as for the charges and expenses, shall be paid by the city treasurer, upon warrants drawn upon said fund from time to time, signed by said commissioners, or a majority of them. All such warrants shall state whether they are issued for land or improvements taken or damaged, or for charges and expenses, and that the demand is payable only out of the money in said fund, and in no event shall the city be liable for the failure to collect any assessment made by virtue hereof, nor shall said warrant be payable out of any other fund, nor be a claim against the city." Although the language of the first part of this section would seem

[9] United Real Estate & Trust Co. v. Barnes (Cal.), 113 Pac. 167 (decided Jan. 11, 1911).

to apply only to the expenses mentioned in the preceding sections, it is held that the provisions as to the payment of money and as to the nonliability of the city apply to all expenses of the proceedings. Thus, it is held that the costs of printing the delinquent list can be paid only out of the special street opening fund.[10]

§ 689. Assessment of Damages and Benefits—Mode.—Section 9 provides: "Said commissioners shall proceed to view the lands described in the resolution of intention, and may examine witnesses on oath to be administered by any one of them. Having viewed the land to be taken, and the improvements affected, and considered the testimony presented, they shall proceed with all diligence, to determine the value of the land, and the damage to improvements and property affected, and also the amount of the expenses incident to said work or improvement, and having determined the same shall proceed to assess the same upon the district of lands declared benefited, the exterior boundaries of which were fixed by the resolution of intention provided for by section 2 hereof. Such assessment shall be made upon the lands within said district in proportion to the benefit to be derived from said work or improvement, so far as the said commissioners can reasonably estimate the same, including in such estimate the real property of any railroad company within said district, if such there be, and may also include in such estimate any or all public property within said district." The foregoing seems to make it necessary for the commissioners to view the property before making the assessment. It is not necessary, however, to take testimony. The commissioners are authorized to take testimony for their own information; but there is no requirement of any formal hearing, nor is anyone entitled to notice that testimony will be taken. No rules are prescribed as to the manner in which the commissioners shall

[10] Brooks v. City of San Luis Obispo, 109 Cal. 50, 41 Pac. 791.

reach their conclusions. We shall see that various rules have been laid down in regard to the determination of the amount of damages in eminent domain proceedings; but these do not apply to the commissioners. They are not obliged to state what method they used in reaching their conclusions.[11]

§ 690. Same—Right to Assess Right of Way of Railroad. The authority to assess real property of railroad companies probably includes authority to assess their rights of way. We have already seen that, as a general rule, a railroad right of way will not be held for a street assessment, without express authorization.[12] In an early case it was held that the right of way of a street railway in the street could be assessed for the benefit derived from street widening; but the statute expressly authorized such an assessment. The language of the court is instructive. Referring to the company, the court said: "Thus it appears that the appellant has acquired an interest in the soil of Kearney street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement become themselves a part of the land —of the estate of the company—and that, in those states where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate

11 This is the rule in regard to assessments for benefits in work done under the provisions of the Vrooman Act for District assessments: See ante, sec. 208.

The commissioners may determine to levy the assessment in proportion to value: Appeal of Piper, 32 Cal. 530. As to the duties of the commissioners under one of the old statutes, see Jacobus v. City of Oakland, 42 Cal. 21.

12 See ante, sec. 187.

in the same manner, and upon the same principles, as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it." And as to the benefit conferred upon such property, the court said: "The business of the appellant is the transportation of passengers for hire, in its cars, over the street railroad running through the entire portion of the street to be widened, from one part of the city to the other. These passengers are taken up at all points along the line. Its profits depend entirely upon the amount of travel over the road. As the travel in its cars increases or diminishes, the profits of the company increase or diminish; and as the profits increase or diminish the value of the easement—the estate of the company in the street traversed by its cars, and upon which its ability to carry and thereby acquire any profits at all depends—increases or diminishes. Whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends." [13]

§ 691. **Same—Right to Assess Public Property.**—The right given in the last clause of section 9 to assess public property has not been passed upon. Whether it authorizes an assessment of property of a school district used for school purposes, or county property, or state property is debatable. There certainly could be no sale of such property for delinquency; and inasmuch as there is no other way prescribed for collecting an assessment, it is my opinion that it was not intended to bind such property. It is held, in general, that a method prescribed by statute for enforcing an assessment is exclusive.[14] Of course no tax or assessment can be levied on federal property. In my opinion, the

[13] Appeal of North Beach and Mission R. Co., 32 Cal. 499.

[14] See ante, sec. 269.

liability is intended to be confined to property of the municipality and to such property of other bodies as is, under general principles, subject to assessment.[15]

§ 692. **Same—Right to Assess Leasehold.**—A lessee, as we shall see, is entitled to damages for injuries to his leasehold resulting from the opening of a street. The courts have not as yet decided whether his interest may be assessed for the costs of the improvement. Ordinarily, however, the assessment is levied against the land only, and not against any particular interest therein. In an early case the Supreme Court held that it is not essential that a leasehold be assessed where the fee obtains the benefit. The court said: "The commissioners took the lease into consideration, and, after a careful investigation, concluded that none of the benefits would accrue to the lessees, but all would accrue to the owner of the fee. They thought that the benefits to accrue from the widening of Kearney street would not be felt upon the cross-street till the widening should be completed, the new buildings erected, the new sidewalks constructed, and the street in its improved condition open to travel; that the time which would be required to complete the improvement, especially when the magnitude of the work and the probability of obstruction and delay likely to arise from litigation in regard to it is considered, was uncertain; that while the improvements were going on, the destruction of the buildings, the obstruction of the street, and the general disturbance consequent upon the work would interfere with the travel and business of the neighborhood for the time, and be a damage to the lessees rather than a benefit; that the full amount of rents would still be received during the time by the landlord; that the benefits would be for all time, and would accrue to him; and that no benefits over the damages resulting

[15] The liability of public property, in general, is discussed ante, sec. 22.

from the disturbance and interference with business would accrue to the lessees."[16]

§ 693. **Effect of Failure to Assess Property Within District.**—It has been held that a failure to assess property within the district declared to be benefited by the improvement renders the assessment void.[17] Under the Vrooman Act, it is held that the mere omission of lots from the assessment will not always render an assessment void upon its face, for, when possible, it will be presumed that the property omitted is included within an exception of work already done.[18] Under the Street Opening Act of 1889, the omission of a lot from the assessment does not necessarily make the assessment void upon its face. The property omitted may belong to the state or federal governments, and thus be exempt. The presumption would seem to be that the commissioners have done their duty.

§ 694. **Apportionment of Damages not Essential to Validity of Assessment.**—The proper apportionment of damages is not a prerequisite to the right of the city council to order a street opened or closed. Hence it follows that an owner cannot object to the validity of such an order upon the ground that no provision has been made for compensation, or, if made, that it is inadequate. If the council has power to pass the order, and an owner suffers any damage by reason thereof, he must seek relief in a direct proceeding therefor.[19]

§ 695. **Report of Commissioners.**—Sections 10, 11, and 12 provide for the report of the commissioners. Section 10

16 Appeal of Reese, 32 Cal. 568.

17 Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

18 See ante, sec. 185.

19 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; Symons v. City and County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

provides: "Said commissioners having made their assessment of benefits and damage, shall, with all diligence, make a written report thereof to the city council, and shall accompany their report with a plat of the assessment district showing the land taken or to be taken for the work or improvement, and the lands assessed, showing the relative location of each district, block, lot, or portion of lot, and its dimensions, so far as the commissioners can reasonably ascertain the same. Each block and lot, or portion of lot, taken or assessed, shall be designated and described in said plat by an appropriate number, and in reference to it by such descriptive number shall be a sufficient description of it in any suit entered to condemn, and in all respects. When the report and plat are approved by the city council, a copy of said plat, appropriately designated, shall be filed by the clerk thereof in the office of the recorder of the county." This report forms the basis for the assessment. The plat corresponds in a general way to the diagram required by the Vrooman Act and the map required by the Local Improvement Act of 1901.[20] It is held that these plats must contain all the information required by the statute. What has already been said as to the form of such plats, in general, applies here. Thus, an arrow showing direction may in some cases be necessary and in others not, the necessity depending upon whether the directions can be otherwise ascertained or not.[21] The diagram should show the relative location of each district, block, lot, or portion of lot, and its dimensions. A failure to show any of these matters would undoubtedly be fatal to the assessment.[22] It would seem that the lots may be described in the report by the lot numbers delineated on the diagram.

[20] As to the diagram under the Vrooman Act, see ante, secs. 212, 213. As to the map under the Local Improvement Act of 1901, see ante, sec. 523.

[21] See ante, sec. 212.

[22] See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

sessed may object both to the amount of the assessment and to the amount to be paid for land taken. Those whose lands are to be taken may protest against the amount allowed therefor; but it would seem that they have no right to protest against an assessment, unless they are also assessed. Ordinarily their only interest in the proceeding is in regard to the amount they are to receive. No particular form of objection is required. In general, the rules applicable to the form of protests under section 4 apply to the objections here authorized.[3]

§ 700. **Time for Hearing, and Objections.**—Section 14 provides that objections shall be filed with the clerk, "who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the city council, which shall fix a time for hearing the same, of which the clerk shall notify the objectors in the same manner as objectors to the original resolution of intention." It is essential that the time be fixed by the city council. Section 4 provides for notice to objectors to the resolution of intention "by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to such objector." There is no provision as to the length of time which must elapse before the hearing can be had. However, it would seem clear that the time must be sufficient to enable the objectors to receive notice and to appear. The notices should be sent in time to give the objectors a reasonable opportunity to appear.

§ 701. **Hearing and Determination.**—Section 14 provides: "At the time set, or at such other time as the hearing may be adjourned to, the city council shall hear such objections and pass upon the same; and at such time, or, if there be no objections, at the first meeting after the day set in such order to show cause, or such other time as may

[3] See ante, sec. 681 ff.

be fixed, shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given, and hearing had, as in the case of an original report." The hearing must not commence before the hour fixed.[4] The jurisdiction of the council to pass upon the report is very broad;[5] but its decision is conclusive only as to the assessment. As we shall see, the owner of land to be taken may refuse to accept the amount offered, and may insist upon having the value determined by a jury in eminent domain proceedings.

§ 702. **Assessment-roll.**—Section 10 provides that "when the report and plat are approved by the city council, a copy of said plat, appropriately designated, shall be filed by the clerk thereof in the office of the recorder of the county." Section 15 provides: "The clerk of said city council shall forward to the street superintendent of the city a certified copy of the report, assessment, and plat, as finally confirmed and adopted by the city council. Said certified copy shall thereupon be the assessment-roll. Immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein."

§ 703. **Collection of the Assessment—Notice That Assessment is Due.**—Section 16 provides the procedure for the collection of assessments. In a general way, it follows the procedure prescribed for the collection of state and county taxes. The superintendent of streets, upon receiving the assessment-roll, must give notice. "The superintendent of streets shall thereupon give notice by publication for ten days in one or more daily newspapers published and cir-

[4] Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

[5] A failure to object is a waiver of a curable defect: Mietzsch v. Berkhout (Cal.), 35 Pac. 321.

culated in such city or city and county, or by two successive insertions in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto." Section 3746 of the Political Code contains a similar provision for notice of state and county taxes. It has been held that the notice required by the Political Code is convenient and desirable, but that inasmuch as it states only matters which are fixed by the statute and with which all taxpayers are charged with notice, it is not essential to the validity of the assessment.[6] Section 16, however, provides that payment must be made within thirty days from the first publication. Hence it would seem necessary to publish notice in order to fix the time of delinquency; and it follows that the rule applicable to general taxation does not apply.

§ 704. **Same—Payment—Delinquency.**—Section 16 then provides for payment of the assessments and for proceedings on delinquency. "When payment of any assessment is made to said superintendent of streets, he shall write the word 'Paid,' and the date of payment, opposite the respective assessment so paid, and the names of persons by or for whom said assessment is paid, and shall, if so required, give a receipt therefor. On the expiration of said thirty days, all assessments then unpaid shall be and become delinquent, and said superintendent of streets shall certify such fact at

6 Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549.

the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent. The said superintendent of streets shall, within five days from the date of said delinquency, proceed to advertise and collect the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece, or parcel of land separately assessed, by the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes; and after the date of said delinquency, and before the time of such sale herein provided for, no assessment shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the cost of advertising then already incurred, shall be paid therewith." The effect of this and the succeeding provisions is to incorporate a part of the general tax law; and it becomes important, therefore, to determine just how far the general tax law applies.

§ 705. **Same—Application of General Laws.**—In determining how far the provisions of the general tax law are applicable, we must read, in connection with the above, a later portion of section 16. "All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds." It is to be noted that only such provisions are adopted as are not inconsistent with the express provisions of this act. In interpreting a somewhat similar provision, the Supreme Court held that in cases where an amendment to the pre-existing law is inconsistent with the statute adopting it, the inconsistent provision is not to be followed. Thus, it was held that the provisions for a sale to the state

§ 708. **Same—Affidavit of Publication.**—Section 3769 of the Political Code provides: "The collector, as soon as he has made the publication required by sections three thousand seven hundred and sixty-four, three thousand seven hundred and sixty-five, three thousand seven hundred and sixty-six, and three thousand seven hundred and sixty-seven, must file with the county recorder and county clerk respectively, a copy of the publication, with an affidavit attached thereto that it is a true copy of the same; that the publication was made in a newspaper or supplement thereto, stating its name and place of publication, and the date of each appearance; and in case there was no newspaper published in his county, that notices were put up in three public places in each of the townships, designating the township and places therein, which affidavit is primary evidence of all the facts stated therein." By "primary" evidence is meant "prima facie" evidence. At the time this provision was adopted "primary" was defined by the Code of Civil Procedure as "prima facie" is now defined.

§ 709. **Same—Manner of Conducting Sale.**—As we have already seen, the sale is governed by the law as it was prior to the amendments of 1895.[15] Section 3771 then read: "On the day fixed for the sale, or on some subsequent day to which he may have postponed it, of which he must give notice, the collector, between the hours of ten o'clock A. M. and three P. M., must commence the sale of the property advertised, commencing at the head of the list, and continuing alphabetically or in the numerical order of lots and blocks until completed." Substituting the words "superintendent of streets" for "collector," the provision seems applicable. Section 3772 read: "He may postpone the day of commencing the sale, or the sale from day to day; but the sale must be completed within three weeks from the day first fixed." And section 3773 read in part: "The

[15] Stats. 1905, p. 204.

owner or person in possession of any real estate offered for sale for taxes due thereon may designate, in writing, to the tax collector, prior to the sale, what portion of the property he wishes sold, if less than the whole; but if the owner or possessor does not, then the collector may designate it, and the person who will take the least quantity of the land, or in case an undivided interest is assessed, then the smallest portion of the interest, and pay the taxes and costs due, including fifty cents to the collector for the duplicate certificate of sale, is the purchaser." Section 3774 read: "If the purchaser does not pay the taxes and costs before ten o'clock A. M. of the following day, the property, on the next sale day, before the regular sale, must be resold for the taxes and costs." And section 3775 read: "The bid of any person refusing to make the payment for property purchased by him must not be received on the sale of any property advertised in the delinquent list of that year."

§ 710. Same—Same—Statutory Provisions must be Followed.—In interpreting these provisions, it must be borne in mind that the proceedings are in invitum, and must be strictly followed. A sale can be made only in the manner and under the circumstances authorized. Hence, it is held that a sale for more than the amount due is void, and will not pass any title.[16] In one case the excess was eight cents, and the court held that it was not a case for an application of the maxim de minimis.[17] It has been said that if a sale of land for a delinquent tax is made for a sum in excess of the legal tax and costs, the sale is void unless the excess is less than the smallest fractional coin authorized by law.[18] The mere fact, however, that the certificate and the deed differ in their recitals as to the sum does not invalidate the

[16] Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Harper v. Rowe, 53 Cal. 233.

[17] Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

[18] Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

sale. The presumption is in favor of the regularity of official action.[19]

§ 711. **Same—Certificate of Sale.**—Upon receipt of the amount due from the purchaser, it was the duty of the tax collector to give a certificate of sale. This was governed by sections 3776, 3777, 3778, and 3779. Section 3776 read: "After receiving the amount of the taxes and costs, the collector must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed." Section 3777 provided: "The certificates must be signed by the collector, and one copy delivered to the purchaser, and the other filed in the office of the county recorder." Section 3778 provided: "The collector, before delivering any certificate, must in a book enter a description of the land sold, corresponding with the description in the certificate, the date of sale, purchaser's name, and amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection without fee, during office hours, when not in actual use." And section 3779 provided: "On filing the certificate with the county recorder, the lien of the state vests in the purchaser, and is only devested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent thereon." Section 3783 provided: "On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the collector."

§ 712. **Same—Same—Form and Contents.**—The statute prescribes the form and contents of the certificate. Hence,

[19] Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

to be valid, the certificate must contain all the matters required. The description must be such as to enable the owner to know what land is charged with the tax, and also to enable a possible purchaser to know what land is offered for sale.[20] The term of redemption should be described as the concurrent happening of the giving of proper notice of application for a deed and the expiration of one year.[21] The fact that the day stated is a holiday is immaterial.[22] A failure to state the name of the owner, if known, renders the certificate void. The certificate must be dated as of the day of sale. It may be made out later, however, and take effect by relation.[23] "But the doctrine of relation can never be made operative to deprive one of a substantial right, which could not have been effectively exercised until after the execution of the instrument or happening of the event, which is held to take effect at or to have relation to the prior date."[24] Thus, where the delay is caused by failure to pay purchase money, and there is therefore no one to whom redemption money must be paid, the certificate does not relate back. The certificate is not made evidence of the validity of the prior proceedings. It is admissible, however, to establish the official act of the officer in making the sale.[25]

§ 713. **Same—Redemption.**—The provisions for redemption were as follows: Section 3780. "A redemption of the property sold may be made by the owner or any party in interest within twelve months from the date of the purchase, or at any time prior to the giving of the notice and the application for a deed, as provided for in section

[20] Miller v. Williams, 135 Cal. 183, 67 Pac. 788. See, also, Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

[21] Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

[22] Rollins v. Woodman, 117 Cal. 516, 49 Pac. 455.

[23] Maina v. Elliott, 51 Cal. 8.

[24] Maina v. Elliott, 51 Cal. 8.

[25] Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

thirty-seven hundred and eighty-five of this code." Section 3781. "Redemption must be made in gold or silver coin, and when made to the county treasurer, he must credit the amount paid to the person named in the collector's certificate, and pay it on demand to the person or his assignees." Section 3784. "On the presentation of the receipt of the person named in the certificate, or of the county treasurer for his use, of the total amount of redemption money, the recorder must mark the word 'redeemed,' the date, and by whom redeemed, on the certificate, and in the margin of the book where the entry of the certificate is made."

§ 714. Same—Notice of Application for Deed.—The right of the purchaser to a deed is also governed by the former provisions of the Political Code. Section 3785 provided, in part: "If the property is not redeemed within the time allowed by law for its redemption, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person has redeemed the property during the time allowed for its redemption. . . . . Provided, however, that the purchaser of property sold for delinquent taxes, or his assignee, must, thirty (30) days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice, stating that said property, or a portion thereof, has been sold for delinquent taxes; giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely until such notice shall have been given and said deed applied for, upon the payment of the fees, percentages, penalties, and

costs required by law. In the case of unoccupied property, a similar notice shall be posted in a conspicuous place upon the property, at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; and no deed of the property sold at a delinquent tax sale shall be issued by the tax collector, or any other officer, to the purchaser of such property, until after such purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax collector, as other files, papers, and records kept by him in his office. Such purchaser shall be entitled to receive the sum of three dollars for the service of said notice, and the making of said affidavit; which sum of three dollars shall be paid by the redemptioner at the same time, and in the same manner as other costs, percentages, penalties, and fees are paid."

§ 715. **Same—Same—Contents.**—The foregoing provision makes both the service of a notice of intention to apply for a deed, and proof thereof, conditions precedent to the execution of a deed. The notice must contain all the matters required by the statute. A notice which does not state that the property has been sold for delinquent taxes, or does not state the date of sale, nor the amount for which the property was sold is insufficient.[1] The notice must specify the correct amount for which the property was sold.[2] A notice which states a larger amount due than is legally due is insufficient.[3] The date fixed for application for a deed

1 Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573.

2 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

3 Reed v. Lyon, 96 Cal. 501, 31 Pac. 619. But the fact that it states, in addition to the amount due, that three dollars will be due for service of notice is immaterial: Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

must be fully thirty days after the date of service.[4] It is not necessary that the notice be dated.[5]

§ 716. **Same—Same—Mode and Proof of Service.**—The mode of service of notice is also prescribed. It "must be served upon the owner of the property, or the person occupying it, in all cases, except where the premises are unoccupied, in which case it may be served by posting upon the property."[6] It must be served thirty days before the day fixed for application for a deed. The time is computed in the usual manner of excluding the first day and including the last. Hence a notice served on July 25th naming August 23d is insufficient.[7] Not only must the notice be served, but legal proof must be made by affidavit.[8] "It is incumbent upon the purchaser to show by his affidavit whether the property was occupied or unoccupied, and, if occupied, that the person upon whom the notice was served was at the time occupying it. The tax collector may have personal knowledge that the person upon whom the notice was served was occupying the property, but such knowledge is insufficient to authorize him to issue the deed. The fact must be made to appear by the affidavit, which is to be filed and form a part of the records of his office. The legislature has made this record essential to the transfer of the title to the purchaser, and parol evidence cannot be substituted for the record thus required."[9] Where notice is posted on the property, the affidavit must allege facts showing that such notice was proper.[10]

4 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

5 Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

6 Hall v. Capps, 107 Cal. 513, 40 Pac. 809.

7 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

8 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761; Hall v. Capps, 107 Cal. 513, 40 Pac. 809; Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

9 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

10 Hall v. Capps, 107 Cal. 513, 40 Pac. 809.

§ 717. **Same—Deed.**—Upon the expiration of the time for redemption, and the performance of all conditions precedent by the purchaser, the superintendent of streets must make a deed to the purchaser. This deed must recite the matters recited in the certificate of sale. "Where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, or the deed will be held void. And, when a form has been made necessary, it is not for the courts to inquire whether the required recitals are of material facts or not."[11] Thus, a failure to state the amount paid for the land makes the deed void;[12] as does also a failure to state the time when the purchaser is entitled to a deed.[13] A statement "that the least quantity of the land described was offered at the sale; that the plaintiff was the person who was willing to take the least quantity thereof and pay the taxes and costs; and that such least quantity was the whole of the land," is sufficient.[14] In cases of sales for delinquency in payment

[11] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

In general, see the following notes in the American State Reports as to tax deeds: Caveat emptor, rule, applies to tax sale, 42 Am. St. Rep. 588; power of legislature to make tax deeds evidence, or to shut off defenses thereto, 4 Am. St. Rep. 187–189; retroactive effect of statute making tax deeds evidence, 4 Am. St. Rep. 189; tax deed as conclusive evidence, 4 Am. St. Rep. 187, 188, 36 Am. St. Rep. 686–688; tax deed may be made prima facie evidence, 4 Am. St. Rep. 188, 189; tax deed, when a cloud on title, 45 Am. St. Rep. 377; tax deeds as evidence of title, 28 Am. St. Rep. 19, 20; tax deeds as prima facie evidence, 36 Am. St. Rep. 683, 684; tax deeds give color of title usually, 88 Am. St. Rep. 726–729; tax deeds, reformation of, 65 Am. St. Rep. 514.

[12] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[13] Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573. Although it has been held sufficient if the deed recites that this statement was contained in the certificate: Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287. But see Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761, where it was held that a defective deed cannot be cured by reference to the certificate.

[14] Rollins v. Woodman, 117 Cal. 516, 49 Pac. 455. See, also, Doland v. Mooney, 79 Cal. 137, 21 Pac. 436; Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287.

of general taxes, the deed must specify the year for which taxes are due.[15] A defective deed cannot be cured by a reference to the certificate of sale.[16] It is not always essential that the recitals of the amount for which the property was sold in the certificate and in the deed agree.[17]

§ 718. **Same—Effect of Deed as Evidence.**—Section 16 provides: "The deed of the street superintendent made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee. It shall be conclusive evidence of the necessity of taking or damaging the lands taken or damaged, and of the correctness of the compensation awarded therefor." The fact that the deed is made prima facie evidence makes it admissible in evidence without preliminary proof as to the regularity of the proceedings.[18] It does not, however, prevent an owner from setting up a defect in the proceedings which renders the deed void.[19] It simply shifts the burden of proof. The second sentence quoted, making the deed conclusive evidence of the necessity of the taking and of the correctness of the compensation awarded therefor, clearly means that it has such effect in an action involving the property conveyed. It certainly has no such effect in an action to condemn, for, as we shall see, the owner has the right to have the amount of compensation determined by a jury. Of course, where the proceedings are void, the deed passes no title.[20]

15 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

16 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

17 Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

18 Clarke v. Mead, 102 Cal. 516, 36 Pac. 862. The fact that the Code of Civil Procedure declares the effect of evidence does not preclude the legislature from dealing with the subject in another statute.

In general, as to the effect of tax deeds as evidence, see 4 Am. St. Rep. 187, note.

19 Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

20 Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220.

§ 719. **Payment of Funds to Treasurer.**—Section 16 then provides for the establishment of a fund into which all money received by the street superintendent shall be paid. "The superintendent of streets shall, from time to time, pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating such fund by the name of the street, square, lane, alley, court, or place for the widening, opening or other improvement of which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners, or a majority of them."

§ 720. **Notice of Payment of Damages.**—Section 17 provides: "When sufficient money is in the hands of the city treasurer, in the fund devoted to the proposed work or improvement, to pay for the land and improvements taken or damaged, and when in the discretion of the commissioners, or a majority of them, the time shall have come to make payments, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of any land or improvements thereon to whom damages shall have been awarded, that a warrant has been drawn for the payment of the same, and that he can receive such warrant at the office of such commissioners upon tendering a conveyance of any property to be taken; such notification, except in the case of unknown owners, to be made by depositing a notice, postage paid, in the postoffice, addressed to his last known place of abode or residence. If at the expiration of thirty days after the deposit of such notice, he should not have applied for such warrant, and tendered a conveyance of the land to be taken, the warrant so drawn shall be deposited with the county treasurer and shall be delivered to such owner, possessor or occupant, upon tendering a conveyance as aforesaid, unless judgment of condemnation shall be had, when the same shall be canceled."

§ 721. **Title can be Obtained Only by Voluntary Conveyance or Suit.**—The foregoing provisions do not affect the title of the owners of the property to be taken. Section 1 of article 14 of the constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." The Supreme Court has held that this contemplates a proceeding in court in all cases where private property is sought to be taken for public use, and that it prohibits any other proceeding to that end.[21] Accordingly it was held that a statute authorizing the opening of roads without court proceedings was invalid.[22] The effect, therefore, of this part of the statute is merely to empower the commissioners to pay a certain amount for the land upon tender of a deed.

§ 722. **City is Entitled to Deed from Owner.**—The city is certainly entitled to insist upon a deed from the owner of the property. The statute expressly provides that a mistake in the designation of the owner shall not invalidate the proceedings; and the fact that such an error is made cannot confer any rights upon the person named. A deed from an administrator, made without authority of court,

21 Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin County, 59 Cal. 320. Compare Wulzen v. Board of Supervisors, 101 Cal. 15, 50 Am. St. Rep. 17, 35 Pac. 353.

22 Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin County, 59 Cal. 320. For an earlier case applying such a statute, see Murphy v. De Groot, 44 Cal. 51. See, also, for decisions under the former constitution, Heyneman v. Blake, 19 Cal. 579; Koppikus v. State Capital Commrs., 16 Cal. 248.

passes no title to the city.[23] After payment of damages to an administrator, however, an heir cannot maintain an action of trespass against the city. The statutes relating to sales of land by an administrator, compliance with which is essential to a valid sale, have no reference to claims accruing to the estate by reason of acts of trespass upon the land.[24]

§ 723. **What Title is to be Acquired.**—The money is to be paid only upon tender of a deed. The question arises as to whether the deed must convey the fee, or whether it is sufficient if it conveys merely an easement. The Supreme Court, in passing upon the effect of a condemnation of land for levee purposes, said: "There can be no doubt that it was within the power of the state to provide by statute that the fee should be taken for that purpose. The rule is, however, and the appellant practically concedes it, that in all cases where property is taken for public use, and an easement is sufficient for the purpose of the use, the fee will not be deemed to be appropriated in any case, unless it is so stated expressly or by necessary implication, either in the statute or in the judgment of condemnation. . . . . It may be granted that where the statute in terms provides for the condemnation of the 'land' or of 'lands' for the public uses and purposes, or where any equivalent term is used, it will usually be construed to authorize the taking of the fee."[25] The present statute expressly refers to the taking of lands; and section 18 refers to proceedings to "condemn the said lands, or an easement therein, as the case may be."

However, section 1239 of the Code of Civil Procedure enumerates the purposes for which a fee simple may be taken, and provides only for an easement for other pur-

[23] McKeeby v. City of Los Angeles, 125 Cal. 639, 58 Pac. 263.
[24] McKeeby v. City of Los Angeles, 125 Cal. 639, 58 Pac. 263.
[25] McCarty v. Southern Pac. Co., 148 Cal. 211, 82 Pac. 615.

poses. It has been held, in eminent domain proceedings, that only an easement can be taken for street purposes.[1] Section 18 provides that proceedings shall be taken "as provided by law under the right of eminent domain." If this makes section 1239 applicable, only an easement can be taken; and if such is the case, a conveyance of an easement is sufficient. On the other hand, it may be argued that only the procedure is adopted. If such is the interpretation, then, under the rule quoted, it would seem that the fee must be conveyed.

§ 724. **Eminent Domain Proceedings—In General.**—Section 18 provides for eminent domain proceedings in cases where the owners refuse to convey. "If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor, as aforesaid, or objects to the report as to the necessity of taking his land, the commissioners, with the approval of the city council, may cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain." Except as modified by this section, the procedure to be followed is that prescribed by the Code of Civil Procedure. The law of eminent domain is too vast to be considered here in detail; so I shall merely treat of the special features of such actions when brought under this statute, and briefly outline a few of the general principles.

§ 725. **Same—Complaint.**—The form of complaint in eminent domain actions is prescribed by section 1244 of the Code of Civil Procedure. The complaint in actions authorized by section 18 is practically the same. Although the commissioners are authorized to commence the action, it must be in the name of the municipality. Section 18 provides: "The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an

[1] City of San Jose v. Freyschlag, 56 Cal. 8.

easement therein, as the case may be, without setting forth the proceedings herein provided for." It is competent for the legislature to prescribe the form of complaints; and no constitutional restriction is violated by this provision.[2] The result of this rule is that the complaint may not show that proceedings have been taken under this act.

§ 726. **Same—Defenses.**—In determining how far the defendant may attack the proceedings, we must bear in mind their double nature. As we have seen, a proceeding for the levying of an assessment under the power of taxation is united with a proceeding to acquire property for street purposes under the power of eminent domain. The defendant cannot set up any irregularity in the proceedings which affects the assessment alone.[3] After the work is ordered, the proceedings are distinct; and a defect thereafter in one branch does not affect the other. A more difficult question arises as to the right of the defendant to attack the resolution ordering the work and the prior proceedings. In one case it was held that a defect in the resolution of intention deprived the council of jurisdiction to order the improvement; and that the action in such a case could not be upheld as a proceeding to condemn the land under the general provisions of the Code of Civil Procedure. A valid ordinance was said to be a necessary preliminary to the action.[4] This case has never been overruled. Its effect, however, has been somewhat impaired by later cases which have intimated that, so far as the right to order the purchase of the land is concerned, the same strictness is not required;[5] and it

[2] City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720. In the early case of City of Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890, a general allegation as to necessity was upheld.

[3] City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[4] City of Los Angeles v. Dehail, 97 Cal. 13, 31 Pac. 626.

[5] See Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

has been questioned whether a failure to give a proper hearing can be raised in eminent domain proceedings.[6]

§ 727. **Same—Legislative Declaration of Public Use Conclusive.**—While the power of eminent domain is confined to the taking of property for a public use, the courts will not usually interfere with the declaration of the legislature as to what constitutes a public use. "There is no doubt that in many cases of attempted taking of private property for public uses, it devolves upon the courts to determine whether or not the use is a public use. These, however, are exceptions to a general rule which recognizes in the legislative department the source of the power to determine what shall be held to be a public use, and the action of the legislature on the question is not, except in extreme cases, open to review by the courts. That the use of land for public streets in an incorporated town is a public use is true beyond controversy."[7]

§ 728. **Same—Evidence of Necessity.**—In ordinary cases of eminent domain, the jury, while not concerned with the question of the character of the use, determines the necessity of the taking for that use. Section 18, however, provides that the resolution or ordinance ordering the work to be done shall be conclusive evidence of the necessity for the taking. This confines the field of inquiry to comparatively narrow limits.[8] Practically nothing but the value of the land can be litigated. The owner cannot complain of such a rule, for the determination of the necessity of taking land for a public use is a legislative rather than a judicial function. "The act of the board of supervisors in determining whether a street shall be opened or closed, or

[6] City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[7] City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224. See, also, Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

[8] City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224. See, also, City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

widened or contracted, or otherwise improved, is a legislative act performed in the exercise of the power which has been conferred upon the municipality by the legislature to enable it to provide for the welfare of its citizens; and, although the board is called upon to exercise its judgment in determining whether to authorize the improvement, such judgment is not the exercise of any judicial function, but is the conclusion which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. The essential elements of judicial action are wanting, namely, the ascertainment of existing rights. . . . . The authority to close a street 'in whole or in part,' which is conferred by the act of March 7, 1889, authorizes the board to diminish the width of the street, and the adoption of the order is a determination by the board that the public interest or convenience requires the improvement. 'The legislature has by the statute referred to conferred upon that body the power to open and close streets whenever the public interest or convenience may require, and the determination of this question by that body is not open for review by the courts.' "[9]

§ 729. Same—Compensation for Property Taken.—The rules for ascertaining the compensation to which an owner is entitled are stated in section 1248 of the Code of Civil Procedure. The court must determine separately, so far as practicable, the value of the property to be taken, the extent of the damage to property not taken, and the amount of benefit to property not taken. The provision as to property taken is contained in subdivision 1, which requires the court to assess "the value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest

[9] Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82, quoting Symons v. City and County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed." In these proceedings, the present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn it. "By the term 'present market value' is meant not what the owner could realize at a forced sale, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property."[10] The peculiar fitness of land for particular purposes is an element in estimating its value, and may be shown.[11] A witness, however, should not be allowed to give his opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted.[12] The plaintiff cannot show that the land has already been dedicated for street purposes in order to reduce the amount of compensation.[13] Nor can the plaintiff show the amounts allowed by street opening commissioners for adjoining property. Such sums are paid by way of compromise, and are not a fair means for estimating the market value.[14] The value is to be determined as of the date of the issuance of the summons.[15]

10 City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.
11 City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.
12 City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.
13 City of San Jose v. Reed, 65 Cal. 241, 3 Pac. 806.
14 City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 Pac. 1083.
15 Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673; Pacific Coast Ry. Co. v. Porter, 74 Cal. 261, 15 Pac. 774.

In general, see the following notes in the American State Reports as to damages: Adaptability of property for a special purpose may be considered in estimating damages, 85 Am. St. Rep. 297, 298; animals, danger to, to what extent a proper element in estimating damages, 85 Am. St. Rep. 309; benefits accruing to owner are not deducted, 22 Am. St. Rep. 50, 51; business, loss of or injury to, not generally an element of damage, 85 Am. St. Rep. 299; compensation for taking franchise, 4 Am. St. Rep. 404; compensation, measure of, 19 Am. St. Rep. 459, 460; compensation, necessity for, 22 Am. St. Rep. 49, 50; compensation of owner for taking property, 16 Am. St. Rep. 610–613; condemnation proceedings give color of title, 88 Am. St. Rep. 729; cost of removing buildings not an element of

§ 730. Same—Compensation for Property Damaged.—Subdivision 2 of section 1248 of the Code of Civil Procedure requires the court to assess, "if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the im-

damage, 85 Am. St. Rep. 296; cost of removing personal property not an element of damage, 85 Am. St. Rep. 298; 299; crops, loss of or damage to, may be considered in estimating damages, 85 Am. St. Rep. 298; crossings, gates, or cattle-guards, cost of, may be considered, 85 Am. St. Rep. 305, 306; damage from overflowed land, 4 Am. St. Rep. 403; damage to land entirely disconnected from that taken cannot be awarded, 85 Am. St. Rep. 299–301; damage to property by change of grade of street, 109 Am. St. Rep. 911; damage to property by erection of objectionable buildings, 109 Am. St. Rep. 914; damage to property by flooding of land, 109 Am. St. Rep. 916; damage to property by imposition of additional servitude on a street, 109 Am. St. Rep. 913; damage to property by interference with the right of access to, 109 Am. St. Rep. 912; damage to property by noises, smoke, and cinders from railway, 109 Am. St. Rep. 914; damage to property by obstruction of light and air, 109 Am. St. Rep. 912; damage to property by obstruction of, or interference with, the right of access to public street, 109 Am. St. Rep. 911, 912; damage to property by obstruction of street on which it does not front, 109 Am. St. Rep. 912; damage to property by the removal of lateral support, 109 Am. St. Rep. 917; damage to property by vacation of street or highway, 109 Am. St. Rep. 913; damage to property considering benefits as an offset, 109 Am. St. Rep. 910; damage to property, discomfort or annoyance to persons, when not considered, 109 Am. St. Rep. 909; damage to property for which no compensation has been made, 109 Am. St. Rep. 908; damage to property from taking a part thereof, 109 Am. St. Rep. 910; damage to property must be special to each owner, 109 Am. St. Rep. 912; damage to property, special injury, whether essential to, 109 Am. St. Rep. 909; damage to property, nominal will not be considered, 109 Am. St. Rep. 909; damage to property, the making of noises by a railway does not amount to, 109 Am. St. Rep. 910; damage of right appurtenant to property, compensation must be paid for, 109 Am. St. Rep. 907; damages, assessment of when corporate property is taken, 9 Am. St. Rep. 144–147; damages by destruction of property to prevent conflagration, 4 Am. St. Rep. 403; damages for crossing one railway by another, 9 Am. St. Rep. 144–146; damages for property actually taken, 85 Am. St. Rep. 292–299; damages from taking property in time of war or extreme necessity, 4 Am. St. Rep. 503; damages, how estimated, 19 Am. St. Rep. 459, 460; damages must be paid for

provement in the manner proposed by the plaintiff." This does not require the court to assess every diminution in value. "The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrin-

changing grade of street, 4 Am. St. Rep. 401; damages must be paid for establishing railroad on highway, 4 Am. St. Rep. 460; damages, speculative, 19 Am. St. Rep. 460; damaging of property does not necessarily involve direct physical injury, 109 Am. St. Rep. 906; damaging of property for public use, what amounts to, 109 Am. St. Rep. 906; damaging of property, history of constitution and legislation requiring compensation for, 109 Am. St. Rep. 907; depreciation in value of property not taken, when to be considered, 85 Am. St. Rep. 311–313; elements of damages allowed in eminent domain proceedings, 85 Am. St. Rep. 291–314; elements of damage other than the loss of the property taken, 85 Am. St. Rep. 299–314; evidence, opinion, as to value of land taken, 19 Am. St. Rep. 460; fencing, cost of, as an element of damages, 85 Am. St. Rep. 304, 305; fencing highways, cost of, may be considered, 85 Am. St. Rep. 304; fencing right of way of railways, cost of, may be considered, 85 Am. St. Rep. 304, 305; fire, danger from, from railroad, may be considered in estimat ing damages, 85 Am. St. Rep. 308, 309; flowage or overflow of land, right of, injury to, may be an element in estimating damages, 85 Am. St. Rep. 302, 303; guaranty against taking property without compensation, origin of in the common law, 109 Am. St. Rep. 905; improvements on the land are considered in estimating damages, 85 Am. St. Rep. 295, 296; inconvenience in use of land, matters causing, are proper elements in estimating damages, 85 Am. St. Rep. 306–308; injury to land not taken, 22 Am. St. Rep. 51, 52; lateral support, loss of right of, is an element in estimating damages, 85 Am. St. Rep. 303; lis pendens in suits to condemn land, 56 Am. St. Rep. 853; market value of the property is the value generally considered, 85 Am. St. Rep. 292, 293; measure of damages in, 22 Am. St. Rep. 50; mines and quarries on land are considered in estimating damages, 85 Am. St. Rep. 295; miscellaneous elements of damage, 85 Am. St. Rep. 313, 314; mortgage lien, effect of proceedings upon, 88 Am. St. Rep. 363–365; noise, annoyance from, or railway, may be considered, 85 Am. St. Rep. 309, 310; obstruction to ingress or egress from the property may be considered, 85 Am. St. Rep. 310, 311; opinion as to value of land, 22 Am. St. Rep. 51; power to take private

sically less valuable by reason of the public use."[16] Where the taking of land requires the owner to fence the remainder, the expense incident to it should be considered in estimating the damages to which he is entitled.[17] The general rule is that no damages can be allowed for injury to business caused merely by the improvement, and not by the taking of the property.[18] In a proceeding of this sort, only damages caused by severance can be allowed. Questions as to damages which will result from the subsequent improvement of the street by the fixing of grades cannot be considered.[19]

§ 731. **Same—Consideration of Benefits.**—Subdivision 3 of section 1248 of the Code of Civil Procedure requires the court to assess "separately, how much the portion not sought

property for public purposes, 22 Am. St. Rep. 48, 49; proceedings to condemn property, 22 Am. St. Rep. 49; proximity of railroad to buildings on land not taken, when to be considered in estimating damages, 85 Am. St. Rep. 311; purpose for which private property may be taken, 22 Am. St. Rep. 49; quality of land is considered as an element of damage, 85 Am. St. Rep. 295; rental value, depreciation in, is to be considered, 85 Am. St. Rep. 296, 297; riparian rights, injury to, is an element of damage, 85 Am. St. Rep. 301; smoke, cinders, and vapors, injury and annoyance from, from railway, may be considered, 85 Am. St. Rep. 309, 310; special estates in property which diminish or enhance the value to the owner, 85 Am. St. Rep. 293–295; subsequent damages, compensation for, 22 Am. St. Rep. 51; "taking," meaning of when used in a constitutional limitation, 109 Am. St. Rep. 905; taking of property, physical injuries which amount to, 109 Am. St. Rep. 906; taking of property, what amounts to, 109 Am. St. Rep. 905; taking private property, what constitutes, 22 Am. St. Rep. 49; what constitutes damages for public use for which compensation must be made, 4 Am. St. Rep. 397–405; who entitled to compensation, 19 Am. St. Rep. 458, 459.

[16] Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

[17] Butte County v. Boydston, 64 Cal. 110, 29 Pac. 511. But it must appear that the land is adapted to some purpose that would pay for fencing: Colusa County v. Hudson, 85 Cal. 633, 24 Pac. 791.

[18] City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

[19] County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972.

to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value." This provision applies, in cases where a right of way is sought, only where the plaintiff is a municipal corporation.[20] A question may arise as to the proper procedure in cases where the street opening commissioners have assessed the portion not to be taken for the benefits to be derived by it from the improvement. The owner certainly cannot be charged twice for the same benefit.

§ 732. **Same—Costs.**—Section 1255 of the Code of Civil Procedure provides that "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." This provision is unconstitutional. In discussing the question, the Supreme Court said: "In proceedings to condemn, the burden of proving the compensation to which they are entitled is cast upon the defendants, who are also entitled to contest the material allegations of the complaint. To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs."[21] The provision in the preceding section to the effect that where a new trial is granted upon the application of the defendant, and the defendant fails upon such new trial to obtain greater compen-

[20] Pacific Coast Ry. Co. v. Porter, 74 Cal. 261, 15 Pac. 774.

[21] City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56. But see dictum in City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

sation than was allowed him upon the first trial, the costs of the new trial shall be taxed against him, is valid.[22] Only legal costs are recoverable in any event.[23] The defendant is not entitled to attorneys' fees.[24]

§ 733. **Same—Right to Possession Before Actual Payment of Damage.**—Section 18 provides: "At any time after trial and judgment entered, or preceding on appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum from the fund appropriated to the particular improvement to answer the judgment and all damages, and thereupon may authorize and order the municipality to enter upon the land and proceed with the proposed work and improvement. . . . . Pending the collection and payment of the amount of the judgment and damages, the court may order such stay of proceedings as may be necessary." The validity of the first of these provisions is open to some question. Section 14 of article I of the state constitution provides that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court, for the owner. This has been construed to require the actual payment of the amount due, either to the owner or into court, before the plaintiff can be authorized to enter upon the property.[25] The giving of security for payment is not sufficient.[1] The validity of the provision of the statute first quoted depends upon whether the setting apart of the fund in the treasury by order of the court constitutes a payment into court. The purpose of payment into court is to place the money under the control of the court so that it may be paid to the defendant. It may

22 Los Angeles etc. Ry. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859.

23 City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

24 San Jose & Almaden R. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

25 Steinhart v. Superior Court, 137 Cal. 575, 92 Am. St. Rep. 183, 70 Pac. 629, 59 L. R. A. 404. See, also, Colton v. Rossi, 9 Cal. 595; McCann v. County of Sierra, 7 Cal. 121.

1 Steinhart v. Superior Court, 137 Cal. 575, 92 Am. St. Rep. 183, 70 Pac. 629, 59 L. R. A. 404.

well be argued that the setting apart of the sum in the treasury places the money under the control of the court, and that the treasurer thereupon becomes the custodian for the court. It seems to me that this is a reasonable construction.[2] The constitution does not require that the plaintiff deposit the amount of costs;[3] but it would seem probable that under this provision the deposit must be of the full amount of the judgment, including costs.

§ 734. **Payment of Judgment.**—Section 18 provides that "any judgment for damages therein rendered shall be payable out of such portion of the special fund as may remain in the treasury, so far as the same can be applied. . . . . In case of a deficiency in said fund to pay the whole of such judgment and damages, the city council may, in their discretion, order the balance thereof to be paid out of the general fund of the treasury, or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last-named case, in order to avoid delay, the city council may advance such balance out of any appropriate fund in the treasury, and reimburse the same from the collections of the assessment."[4] The supplementary assessment is provided for in section 18.

§ 735. **Payment of Warrants.**—Section 19 provides: "The treasurer shall pay such warrants out of the appropriate fund, and not otherwise, in the order of their presentation; provided, that warrants for land or improvements taken or damaged shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money is and remains in the fund to pay all warrants of the first class before paying any of the second."

2 A somewhat similar statute was sustained under the old constitution: See Gilmer v. Lime Point, 18 Cal. 229, 260.

3 City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

4 In Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150, the money was advanced out of the general funds, as in this section authorized.

§ 736. **Supplemental Assessment.**—Section 20 provides: "If after the sale of the property for delinquent assessments there should be a deficiency, and there should be unreasonable delay in collecting the same, or if for the purpose of equalizing the assessments supplying a deficiency, or for any cause it appears desirable, the commissioners may so report to the city council, who may order them to make a supplementary assessment and report the same in manner and form as the original, and subject to the same procedure. If by reason of such supplementary assessment, or for any cause, there should be at any time a surplus, the city council may appropriate the same and declare a dividend pro rata to the parties paying the same, and they, upon demand, shall have the right to have the amount of such pro rata dividends refunded to them, or credited upon any subsequent assessment for taxes made against said parties in favor of said city." The procedure here provided is clear, and little need be said of it. The power of the council is not limited to one supplementary assessment. If the first is insufficient, a second may be levied.[5]

§ 737. **Procedure in Case of Defective Title.**—Section 21 provides: "If any title attempted to be acquired by virtue of this act shall be found to be defective from any cause, the city council may again institute proceedings to acquire the cause, as in this act provided, or otherwise, or may authorize the commissioners to purchase the same and include the cost thereof in a supplementary assessment as provided in the last section." This corresponds to the general provision relating to eminent domain, contained in section 1250 of the Code of Civil Procedure. The council is authorized to adopt one of three courses: (1) It may commence proceedings anew. Inasmuch as other procedures are simpler, this proceeding is not of general use. (2) It may commence proceedings under the general power of eminent domain. This section authorizes proceedings un-

[5] Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

der this act "or otherwise." We have already seen that this act does not prevent the city from proceeding under the general provisions.[6] (3) It may authorize the commissioners to purchase the outstanding title and pay the cost by a supplementary assessment. Inasmuch as the work of opening has already been ordered, the purchase of an outstanding title, it would seem, does not require the obtaining of any further jurisdiction. It is merely the means of carrying out the order.

§ 738. **Payment of Expenses Out of City Funds.**—Section 22 provides: "If the city council deem it proper that the boundaries of the districts of lands to be affected and assessed to pay the damages, cost and expenses of any work or improvement under this act, shall include the whole city, then the commissioners appointed shall proceed in a summary manner to purchase the lands to be taken or condemned from the owners and claimants thereof. If said commissioners and the owners and claimants cannot agree upon the price to be paid for said lands, they shall proceed to view and value the same, and shall thereupon make a summary report to the city council. Upon final confirmation of the report, the city council, if there be not sufficient money available in the city treasury, shall cause the cost and expenses of the contemplated public improvement to be assessed upon the whole of the taxable property of said city, and to be included in and form part of the next general assessment-roll of said city, and with like effect in all respects as if the same formed a part of the city, state, and county taxes; and when the same shall have been collected the said city council shall cause the land required to be paid for or the value thereof tendered, and the said contemplated public improvement to be forthwith made and completed. All the provisions of the preceding sections not in conflict with this section shall be applicable thereto." This has been construed to authorize the city council to pay the

[6] See ante, sec. 665.

whole of the expense "from the ordinary revenues of the city, if they deem the improvement of such general benefit to the city that the whole city constitutes the district to be benefited thereby. The section is practically the same in effect in the respect under discussion as section 26 of the Vrooman Act, authorizing the council to pay the whole or any portion of the cost of street work out of the ordinary revenues of the city."[7] It would seem that the clear intent of this section is to raise the money by general taxation. There is no procedure for determining benefits. Apparently, the council is to assess the cost upon the property by merely adding a fixed sum to the general tax rate. It would seem that the council must follow the procedure outlined in the earlier sections as to acquiring jurisdiction. The later procedure, obviously, is greatly simplified, for no report need be made as to anything but the property to be taken. Inasmuch as the expense of the work may be paid out of the general funds of the city, bonds may be issued to obtain the necessary money under the act of 1901.[8]

§ 739. **Continuation of Prior Proceedings.**—Section 24 provides for the continuation of prior proceedings under the provisions of this act. The section is no longer of practical importance, and therefore will not be considered in detail. It has been urged that the title of the act is not broad enough to include this; but the Supreme Court has held it sufficient.[9]

§ 740. **Remedies of Owners.**—We have discussed the question of remedies in the introductory chapter, and little need be added here. An owner, of course, is entitled to an injunction to restrain the authorities from taking his prop-

[7] City of San Diego v. Potter, 153 Cal. 288, 95 Pac. 146.

[8] City of San Diego v. Potter, 153 Cal. 288, 95 Pac. 146.

In general, as to the Municipal Improvement Act of 1901, see Town of Mill Valley v. House, 142 Cal. 698, 76 Pac. 658.

[9] City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

erty for public use without compensation.[10] An owner assessed may enjoin the sale of his property when the proceedings are valid on their face, on the ground that a sale will create a cloud on title.[11] An owner who pays under protest may recover from the city the amount paid, provided he is obliged to pay in order to prevent a cloud on title.[12] This means that he may recover in cases where the proceedings are not void upon their face. As we have seen, it is generally held that statutory provisions relating to general taxation do not apply to special assessments unless expressly made applicable; and it has been held, in accord with this principle, that section 3819 of the Political Code, dealing with the recovery of taxes paid under protest, does not, in general, apply to special assessments. Section 16 of this act adopts the general provisions as to sales and redemption of property, so far as not inconsistent with the terms of the act. It does not, however, expressly adopt other provisions, and I doubt if it can be construed to adopt the provision referred to.[13] The right to recover money paid under protest is independent of this provision.

10 See ante, sec. 27.

11 See ante, sec. 28.

12 See ante, sec. 31. See, also, Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

13 In Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150, the court held, under the facts of that case, that it was unnecessary to decide whether section 3819 of the Political Code applies or not.

CHAPTER II.

THE STREET OPENING ACT OF 1893.

§ 741. Constitutionality—In general.
§ 742. Same—Right to classify according to population.
§ 743. Same—Application of general rules.

§ 741. Constitutionality—In General.—In 1893 the legislature passed an act entitled, "An act to provide for laying out, opening, extending, widening, straightening, diverting, curving, contracting, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities or cities and cities and counties of forty thousand inhabitants or over, and to condemn and acquire any and all land and property necessary or convenient for that purpose." This act attempts to limit the Street Opening Act of 1889 to cities having less than forty thousand inhabitants. The act of 1893, however, is generally conceded to be unconstitutional and of no effect.[1] Its invalidity consists in the fact that it attempts to classify cities in a manner unauthorized by the constitution. The constitution requires that special laws shall not be passed where a general law can be made applicable.[2] Inasmuch as this act is never used, I shall not discuss the procedure it provides.

§ 742. Same—Right to Classify According to Population.—Section 6 of article XI of the constitution authorizes the legislature, by general laws, to provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. The same section provides that cities and towns shall, except in municipal affairs, be governed by general laws. The right to classify according to population has been limited to incorporation and organization matters.[3]

1 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.
2 Art. 4, sec. 25, subd. 33.
3 City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

Moreover, it was intended that the classification authorized should be by a general law in the same sense and in the same way in which it is necessary to provide for the incorporation and organization of cities and towns. Legislation in regard to such incorporations should thereafter be made by reference to the classes thus made.[4] In accordance with the constitutional provision, the legislature in 1883 passed a general classification act. In regard to this, the Supreme Court has said: "But, while it is thus seen that all municipalities within the state are subject to the operation and control of general laws under the Classification Act of 1883, provided those laws affect their incorporation and organization, and while it is further seen that a law touching upon matters of incorporation and organization will not be held to be a special law because it operates only upon one of several of the classes, it does not follow that there may not be legislation not affecting incorporation or organization which will be general without reference to the Classification Act of 1883. . . . . To illustrate: The legislature might desire to allow all seaboard cities to provide outlets for their sewers in the ocean. Such outlets, unless permitted or sanctioned by the legislature, might be held purprestures. It would be meaningless for the legislature to declare that all cities of the first class, or of the second class, or of the third class, might provide such outlets, for of the municipalities in the enumerated classes many might be inland cities. A law providing that all seaboard towns and cities may provide such outlets for their sewers would neither conform to the Classification Act of 1883, nor would it apply to all municipalities within the state; but it would still apply to all within the class thus created by the act itself, that is to say, to all similarly situated, and would be a general law contemplated and permitted" by the constitution.[5] "But when a law is made to apply to a class, and not to all within the same category, plain reason must appear for the limi-

[4] Darcy v. Mayor etc. of San Jose, 104 Cal. 642, 38 Pac. 500.
[5] Rauer v. Williams, 118 Cal. 401, 50 Pac. 691.

tation. It by no means follows that a law is general because it operates upon all within a class. It is still special if it applies to all within a class, without reason appearing why it is not made to apply generally to all."[6] The validity of the act of 1893 depends, then, upon whether there is a valid reason for the classification it makes.

§ 743. **Same—Application of General Rules.**—In applying the principles above set forth, it has been held that there is no valid reason for requiring special conditions for eminent domain proceedings by cities of the fifth and sixth classes; and hence a statute which imposes such special conditions is void.[7] Likewise, the salaries of police officers cannot be regulated by a special act, according to population of the city.[8] Again, the fees of city officers in cities having a population of more than one hundred thousand cannot be fixed by a special act.[9] The people of small cities are entitled to the same protection as those of larger. Applying these principles and cases to the present act, it seems clear that it is invalid. No valid reason appears why a city of less than forty thousand should not be governed by the same procedure for opening streets as a city of greater population. Even conceding that the constitutional amendment of 1896, providing that cities shall, except in municipal affairs, be governed by general laws, authorizes special legislation other than city charters, when this statute was passed it was void, and it was not given life by the subsequent amendment.

[6] Rauer v. Williams, 118 Cal. 401, 50 Pac. 691. "The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be founded upon some natural or intrinsic or constitutional distinction": People v. Central Pac. R. R. Co., 105 Cal. 576, 38 Pac. 905.

[7] City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[8] Darcy v. Mayor etc. of San Jose, 104 Cal. 642, 38 Pac. 500.

[9] Rauer v. Williams, 118 Cal. 401, 50 Pac. 691.

CHAPTER III.

STREET OPENING ACT OF 1903.

§ 744. Scope of the act.
§ 745. Act of 1889 not affected.
§ 746. History of the act.
§ 747. General principles.
§ 748. Outline of the procedure.
§ 749. Main distinctions between acts of 1889 and 1903.
§ 750. The ordinance of intention.
§ 751. Notice of the passage of the ordinance—How posted.
§ 752. Same—Contents of the notice.
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§ 755. Proof of publication and posting.
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§ 757. Same—Form.
§ 758. Same—Effect of majority protest to improvement.
§ 759. Same—Same—Exceptions.
§ 760. Same—Protest to improvement not signed by majority.
§ 761. Same—Protest to extent of district.
§ 762. Same—Hearing and determination.
§ 763. The ordinance ordering the work.
§ 764. Time for commencing action to condemn.
§ 765. General rules governing the action.
§ 766. The complaint.
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§ 768. Invalidity of ordinances as a defense.
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§ 771. Time at which right to damages accrues.
§ 772. Rules for ascertaining damages.
§ 773. Hearing on report—Rights of parties to action.
§ 774. Same—Rights of owners liable to be assessed.
§ 775. Intervention of owners liable to assessment in case of trial in court.
§ 776. Notice of postponement not required.
§ 777. Interlocutory judgment.
§ 778. Interest not allowable.
§ 779. Appeals.
§ 780. Abandonment of proceedings.
§ 781. The diagram.
§ 782. The assessment—In general.
§ 783. Same—What it shall include.
§ 784. Same—Contents.

§ 785. Notice of filing assessment.
§ 786. Objections to assessment.
§ 787. Hearing and determination on objections.
§ 788. Record of assessment—Accrual of liens.
§ 789. Right of owner of property taken to setoff.
§ 790. Collection of the assessment—In general.
§ 791. Publication of delinquent list.
§ 792. Right to pay before sale.
§ 793. Sale for delinquency.
§ 794. Certificate of sale.
§ 795. Redemption from sale.
§ 796. Notice of application for deed—In general.
§ 797. Same—Contents of the notice.
§ 798. Same—Service and proof thereof.
§ 799. The deed.
§ 800. Effect of deed as evidence.
§ 801. Payment by street superintendent to city treasurer.
§ 802. Payment of judgments, and condemnation.
§ 803. Procedure in case of deficiency.
§ 804. Disposition of surplus.

§ 744. Scope of the Act.—The Street Opening Act of 1903 provides for practically the same work that is authorized by the act of 1889, with the exception of closing up streets. Section 1, stating the jurisdiction, is as follows: "Whenever the public interest or convenience may require, the city council of any municipality shall have full power and authority to order the laying out, opening, extending, widening, or straightening, in whole or in part, of any public street, square, lane, alley, court, or place within such municipality, and to acquire, by condemnation, any and all property necessary or convenient for that purpose." As with the act of 1889, this act does not authorize the improvement of a street after it is opened.[1] It is limited to an assessment for the cost of the lands and improvements to be taken or damaged, and to the expenses of the proceedings. Authority to determine the necessity of the improvement is vested absolutely in the city council. Its action is

1 See Wilcoxson v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988. This case applies to the act of 1889, but the reasoning makes it equally applicable here.

legislative and not judicial, and cannot be reviewed by the courts on certiorari.[2] The act is constitutional.[3]

§ 745. **Act of 1889 not Affected.**—This act does not affect the act of 1889, but is intended to provide an alternate procedure.[4] This is expressly stated in section 36. "This act shall in no wise affect an act entitled, 'An act to provide for laying out, opening, extending, widening, straightening, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose,' approved March 6, 1889, or amendments thereto, or any other acts on the same subject, or apply to proceedings had thereunder, but it is intended to and does provide an alternate system of proceedings for making the improvements provided for by this act; and it shall be within the discretion of the city council of any municipality to proceed in making such improvements, either under the provisions of this act, or under the provisions of such other acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict with the provisions hereof shall be void and of no effect as to the proceedings commenced under the provisions of this act. The election of the city council to proceed under the provisions of this act shall be expressed in its ordinance of intention to order the work done."

§ 746. **History of the Act.**—The original act was passed in 1903. Ten of the sections were amended in 1909.[5] The

[2] See the following cases, dealing with the act of 1889, but clearly applicable to this act: Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; Symons v. City and County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

[3] Title Ins. & Trust Co. v. Lusk, 12 Cal. App. Dec. 199 (February 11, 1911).

[4] Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

[5] Stats. 1909, p. 1035 ff.

principal amendments were as follows: Section 4 now requires more particularity in the form of protests. It also authorizes the overruling of protests in certain cases, although a majority of the owners may have joined. Section 6 now definitely limits the time within which the action to condemn must be brought. Sections 8 and 9 have been made fuller in regard to referees. Section 10 now fixes the time from which the right to compensation is deemed to have accrued. Section 11 now requires more particularity as to notice of filing the referees' report, and as to the hearing. Section 12 no longer limits the compensation of referees. Section 16 now goes into more detail as to the assessment. Section 33 has been amended by adding a definition of "owner." The general scheme of the act, however, remains unchanged. Sections 14 and 33 were amended in 1911.

§ 747. **General Principles.**—The general principles applicable to street opening statutes have been treated in the chapter dealing with the act of 1889, and need not be repeated in detail here.[6] The proceeding is twofold: It provides for a taking of property for public use, under the power of eminent domain. It provides for assessing the costs upon a district benefited, under the power of taxation. An owner of property to be taken has the right to compensation and the right to have that compensation paid before his property is taken. These rights are protected by the present statute. This act does not prevent the city from proceeding to take land needed for street purposes under the general provisions of law relating to eminent domain.[7]

§ 748. **Outline of the Procedure.**—In outline, the procedure is as follows: (1) The council must pass a resolution of intention. (2) Notice thereof must be given by posting and publication. (3) Protests may be filed both as to the

[6] See ante, secs. 662–670.

[7] See ante, sec. 665.

improvement and as to the assessment district. The effect of a majority protest as to the improvement is much the same as that of a majority protest under the Vrooman Act. (4) A hearing must be had on the protests, after notice. (5) If the protests are overruled, the council must, by ordinance, order the improvement, and direct the city attorney to commence an action to condemn the property to be taken. (6) If the parties to the action waive both a trial by jury and by the court, referees may be appointed to assess damages and report to the court. The court, after notice and hearing, may adopt the report. If trial in court is not waived, the action must be tried in the same manner as other eminent domain actions. (7) The court enters an interlocutory judgment establishing the amount to be paid. (8) The council must then instruct the city engineer to make a diagram of the district, which must be delivered to the superintendent of streets, who makes and files the assessment. (9) Notice of the assessment must be given, objections may be made, a hearing may be had, and the council may confirm, modify, or correct the assessment. (10) The assessment must then be delivered to the superintendent of streets, who must record it. It then becomes a lien. (11) The superintendent must give notice of the assessment, collect the amounts due, and sell property upon which assessments are delinquent. (12) All moneys collected must be paid into the city treasury. When sufficient money is on hand, the amounts of the interlocutory judgments must be paid to the persons entitled or into court for their benefit. Thereupon, the court shall enter a final judgment of condemnation. (13) In case of a deficiency, the council may pay out of the general fund or direct a supplementary assessment.

§ 749. Main Distinctions Between Acts of 1889 and 1903. While there are many differences in detail between the acts of 1889 and 1903, the chief distinctions are two: (1) The act of 1889 provides for an assessment prior to condemna-

tion; the act of 1903 provides for condemnation proceedings prior to the assessment. The advantage of the latter is obvious, for the assessment can be made for the necessary amount in the first instance. (2) The act of 1889 provides for an apportionment of damages by commissioners and a subsequent condemnation proceeding if the owners are not satisfied with the amount awarded. The act of 1903 provides for condemnation proceedings in the first instance.

§ 750. **The Ordinance of Intention.**—The first step in the proceedings is the passage of an ordinance of intention. Section 2 provides: "Before ordering any improvement to be made, which is authorized by section 1 of this act, the city council shall pass an ordinance declaring its intention to do so, describing the improvement, and the land necessary or convenient to be taken therefor, and specifying the boundaries of the district to be benefited by said improvement, and to be assessed to pay the expense thereof, and to be known as the assessment district." It is to be noted that this act requires an ordinance of intention. We have seen that an ordinance includes a resolution, and that therefore when a statute provides for a resolution, the action may be taken by ordinance.[8] It would seem that the requirement of an ordinance, however, would not be satisfied by a resolution. The ordinance should be adopted in the same manner in which other municipal ordinances, under charter provisions, must be adopted. The contents of the ordinance of intention are practically the same as those required for the resolution of intention under the Street Opening Act of 1889.[9] It is well to designate the newspaper in which notice shall be published; although it is generally held that the designation may be in a separate resolution.[10] In addition to the matters required by section 2, the ordinance of intention should express an election to proceed under the

[8] See ante, sec. 65.

[9] See ante, secs. 675–677. See, also, secs. 64–88 in regard to the resolution of intention under the Vrooman Act.

[10] See ante, sec. 90.

terms of this act.[11] In the street acts, the resolution or ordinance of intention is always held to be jurisdictional; and upon it depends the validity of the subsequent proceedings.[12]

§ 751. **Notice of the Passage of the Ordinance—How Posted.**—The provision for posting notice of the passage of the ordinance of intention is similar to that required by the act of 1889, but it is more definite. Section 3 provides: "The street superintendent shall thereupon cause to be conspicuously posted along all streets and parts of streets within the assessment district described in said ordinance, at not more than three hundred feet in distance apart, notices (not less than three in all) of the passage of said ordinance." This requires posting in front of all property within the assessment district, and in this respect differs from the provisions of the Vrooman Act and the Street Opening Act of 1889. The provision that the notices shall be not more than three hundred feet in distance apart means that they shall be not more than that distance measured longitudinally along the street.[13] A failure to post along all the streets in the district renders the proceedings void. Where a street terminates in another, a notice posted on the nonterminating street opposite the termination cannot be considered as posted on the terminating street.[14]

§ 752. **Same—Contents of the Notice.**—The provision as to the contents of the notice is practically the same as the corresponding provision of the act of 1889, and also as the provision in section 3 of the Vrooman Act as to the superintendent's notice.[15] Section 3 provides: "Said notices shall

11 See section 36 of this act.

12 See ante, sec. 64. As to the resolution of intention under the Street Opening Act of 1889, see ante, secs. 675–677.

13 See ante, sec. 95.

14 Pierce v. City of Los Angeles, 12 Cal. App. Dec. 474 (decided March 24, 1911).

15 As to the act of 1889, see ante, sec. 680. As to the Vrooman Act, see ante, sec. 94.

be headed, 'Notice of Public Work,' in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said ordinance, and briefly describe the improvement proposed, and refer to said ordinance for further particulars." As has been already said, the notice is sufficient if it is precise as to the facts required by the statute, accurately describes the portion of the street to be improved, and contains such brief description of the work as, with the reference to the resolution, will inform all parties as to the work proposed.[16] It is not necessary to set out the ordinance in full; but this may be done,[17] in which event it is not necessary to refer to the ordinance for further particulars.[18]

§ 753. **Same—Publication.**—In addition to posting, the superintendent of streets must also publish notice. Section 3 provides: "He shall also cause a notice similar in substance to be published for a period of five days, in a daily newspaper published and circulated in said municipality, and designated by said city council for that purpose, or if there is no such daily newspaper, then by four successive insertions in a weekly newspaper so published, circulated, and designated." It is essential that the newspaper be designated by the council before the publication begins.[19] It is customary to insert the designation in the ordinance of intention, although this is not essential.[20] A publication without such designation is without avail, and gives the council no jurisdiction to proceed.[21] The question of the sufficiency of the publication has been considered in another chapter.[22]

[16] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585.

[17] McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924; Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

[18] Schmidt v. Market St. etc. R. R. Co., 90 Cal. 37, 27 Pac. 61.

[19] See ante, sec. 90.

[20] See ante, sec. 90.

[21] See ante, sec. 90.

[22] See ante, sec. 97.

§ 754. Procedure in Cities Where There is No Newspaper.—Section 34 provides: "In case there is no daily or weekly newspaper published and circulated in the city, then such notices and delinquent lists as are herein required to be published in a newspaper shall be posted in three of the most public places in such city, for the length of time required herein for the publication of the same in a weekly newspaper. No publication or notice other than that provided in this act shall be necessary to give validity to any proceedings had thereunder."

§ 755. Proof of Publication and Posting.—Section 35 provides: "Proof of publication of any notice required by this act shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting."

§ 756. Protests—In General.—Section 4 makes elaborate provision for protests and for a hearing thereon. "Any person interested, objecting to said improvement, or to the extent of the assessment district, described in said ordinance of intention, may file a written protest with the clerk of the city council, within thirty days after the first publication of the notice required by section 3 of this act.". This provides for two classes of protest: (1) A protest against the improvement, which may be made both by parties whose lands are liable to assessment and by those whose lands may be taken or damaged. (2) A protest against the extent of the district. This latter affects only those subject to

assessment. The time for filing protests is limited to thirty days after the first publication of notice. This will undoubtedly be construed to mean that they cannot be filed after that time, but that they may be filed any time before.[23] Thus, it would seem that a protest filed after the passage of the ordinance of intention but before publication of notice would be in time. The section further provides: "The clerk shall indorse on every such protest the date of its reception by him, and, at the next regular meeting of the city council, after the expiration of the time for filing protests, he shall present to said city council all protests so filed with him." The protestants are not bound to see that the clerk makes the indorsements.[24] They have done their full duty when they file a proper protest. The provisions of section 4 are similar in many respects to the provisions of section 3 of the Vrooman Act; and what has been said in regard to that should be read with this section.[25]

§ 757. **Same—Form.**—This act prescribes the form of the protests. "Every such protest must contain a description of the property in which each signer thereof is interested, sufficient to identify the same, and must set forth the nature of his interest therein, and must be accompanied by the affidavit of one of the signers thereof that each signature thereof is the genuine signature of the person whose name is thereto subscribed; and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements, shall not be considered by the city council." It is a general rule that protests, being for the benefit of the property owner, are not to be strictly construed.[1] Hence, it would seem that only a substantial compliance with these pro-

[23] See Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262.

[24] City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

[25] See ante, sec. 99 ff.

[1] See Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

visions is required. The object of a description of the property is apparently twofold: (1) To enable the council to determine that the signer is interested. (2) To enable the council to determine the amount of frontage. Any description which is sufficient to show that the property is within the district and to show the frontage would probably be held sufficient.[2]

Subdivision 7 of section 33 defines "owner" and "any person interested." "The terms 'owner' and 'any person interested' include the person owning the fee, or the person in whom, on the day any protest or petition is filed, the legal title to real property appears, by deeds duly recorded in the county recorder's office of the county in which said city is situated, or any person in possession of real property, as the executor, administrator, trustee under an express trust, guardian or other legal representative of the owner, or any person in possession of real property under a written contract of purchase thereof duly recorded, or any person in possession of real property, as lessee thereof under a lease duly recorded, which shall require such lessee to pay or discharge all assessments for street or other public improvements, that may be levied or assessed against such real property."

§ 758. **Same—Effect of Majority Protest to Improvement.**—In prescribing the effect of protests, section 4 distinguishes between protests against the improvement and protests against the extent of the district. "If such protests are against said improvement, and said city council finds that the same are signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district, all further proceedings under said ordinance of intention, excepting in the cases hereinafter otherwise provided, shall be barred, and no new ordinance of intention for the same improvement shall be passed within six months after the presentation of

[2] I have discussed the matter of protests more at length in the chapters on the Vrooman Act: See ante, sec. 99 ff.

such protest to the city council, unless the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district shall in the meantime petition therefor." This provision is very similar to the provision as to the effect of a majority protest contained in section 3 of the Vrooman Act.[3] The effect of the majority protest is to bar all proceedings under the original ordinance of intention, and to bar the commencement of other proceedings for the same work for a period of six months. Work cannot be done under the original resolution of intention, even after the lapse of the period of six months.[4] No hearing is necessary when the council decides that the protest is a bar.[5] If the protest is not signed by a majority, the statute requires a hearing. In determining whether the protest is signed by the requisite number, all the frontage within the district must be counted. The effect of this is that a corner lot is counted as two frontages. "In the case of property held by tenancy in common, if any cotenant sign such protest, only the proportionate share of the frontage thereof represented by his interest therein, shall be counted in determining the amount of frontage represented by his interest therein."

§ 759. **Same—Same—Exceptions.**—In three cases a majority protest to the improvement is not a bar: (1) "If the proposed improvement is for the opening or extending of a street for a distance of not more than two blocks intervening between the terminations of two different streets, or two portions of the same street, existing at the time of the passage of the ordinance of intention for the proposed improvement, each of said different street or said portions of the same street being at least five blocks in length, and the opening or extending of the street described in the or-

[3] See ante, sec. 105, for a discussion of the corresponding provisions of the Vrooman Act.

[4] This proposition is abundantly supported by cases interpreting the Vrooman Act: See ante, sec. 105.

[5] See Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262.

dinance of intention through such intervening block or blocks will, together with such different streets or portions of the same street so existing, make one connecting or continuous street, as nearly as may be practicable." (2) "If the proposed improvement is for the opening or extending of a street into a different street, for a distance of not more than one block intervening between the termination of such street so proposed to be opened or extended and such different street, when the street so proposed to be opened or extended through such intervening block exists, at the time of the passage of the ordinance of intention, for a distance of at least five blocks." (3) "If the proposed improvement is for the opening or extending of a public street, lane, alley, court or place through the remainder of a block when such public street, lane, alley, court or place exists, at the time of the passage of the ordinance of intention for the proposed improvement, for at least one-half of the distance through such block."

§ 760. **Same—Protest to Improvement not Signed by Majority.**—Protests do not amount to a bar "if such protests are against the improvement; and the council finds that they are not signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district." Under the Vrooman Act, it is held that where the protest purports on its face to be signed by a majority, the council must make an express finding that it is not so signed, or the work will be barred.[6] The fact that the council proceeds with the work does not, under that act, amount to a sufficient determination. It would seem that the same rule should apply here. The determination of the fact involves the determination of whether the signers are the owners of the property. Under this act, this can be determined, prima facie, from the statements in the protests.

[6] See Pacific Pav. Co. v. Gallett, 137 Cal. 174, 69 Pac. 985. See, also, Pacific Pav. Co. v. Geary, 136 Cal. 373, 68 Pac. 1028; Dougherty v. Harrison, 54 Cal. 428.

§ 761. **Same—Protest to Extent of District.**—A majority protest to the extent of the district does not act as a bar to further proceedings, unless the council so decides. The objection goes only to the property to be charged.

§ 762. **Same—Hearing and Determination.**—The effect of filing objections in cases where they do not constitute an absolute veto upon the council's jurisdiction to order the work is to suspend the exercise of that jurisdiction until the objections of the protestants are passed upon.[7] An ordinance ordering the work passed before hearing is void. The provisions for a hearing are as follows: "The city council shall thereupon fix a time for hearing said protests, not less than ten days after the meeting of the council at which such time is so fixed, and shall cause notice of the time of such hearing to be published for at least five days in a daily newspaper published and circulated in said city, or if there be no such daily newspaper, by at least two insertions in a weekly newspaper so published and circulated. The city council shall hear said protests at the time appointed, or at any time to which the hearing thereof may be adjourned, and pass upon the same, and its decision thereon shall be final and conclusive. If any such protests are sustained, no further proceedings shall be had under said ordinance of intention, but a new ordinance of intention for the same improvement may be passed at any time. If the protests are denied, the proceedings shall continue as if such protests had not been made." The council should designate the newspaper in which the notice is to be published. The hearing must not be had before the hour fixed.[8] The decision of the council is final and conclusive only as to the matters upon which it is authorized to decide.[9] Upon this hearing these are three: (1) Whether the improvement

[7] See Gray v. Burr, 138 Cal. 109, 70 Pac. 1068.

[8] See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

[9] See ante, secs. 251–263. See, also, Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

shall be made. (2) Whether a protest is signed by the owners of a majority of the frontage. (3) Whether the assessment district is proper. The action of the council does not cure any jurisdictional defect.[10] An owner is not obliged to make any objection arising out of such a defect;[11] and if he does object, he is not bound by the council's decision.[12]

§ 763. **The Ordinance Ordering the Work.**—Section 4 provides that jurisdiction to order the improvement shall attach as follows: "At the expiration of the time within which protests may be filed, if none are filed, or if protests are filed, and after hearing are denied, as above provided, then upon such denial, the city council shall acquire jurisdiction to order the improvement described in the ordinance of intention." An ordinance passed prior to the time jurisdiction attaches is void, and cannot support any subsequent proceedings.[13] The work to be ordered must be the same as that described in the ordinance of intention.[14] The contents of the ordinance ordering the work are prescribed by section 5. "Having acquired jurisdiction, the city council shall, by ordinance, order said improvement to be made, and direct an action to be brought by the city attorney, in the proper superior court, in the name of the municipality, for the condemnation of the property necessary or convenient to be taken therefor. Such ordinance need not describe the property to be taken, nor the assessment district, but may refer to the ordinance of intention for all particulars."

§ 764. **Time for Commencing Action to Condemn.**—Section 6 limits the time within which the action to condemn may be commenced. "Said action must be brought within sixty days after the passage of the ordinance ordering the

10 See ante, secs. 251–263. See, also, Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

11 See Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

12 See Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

13 See ante, sec. 129.

14 See ante, sec. 131.

improvement, but the council may, by ordinance, extend the time for bringing such action for an additional period not exceeding ninety days." It is questionable whether this is a mere statute of limitations, which can be taken advantage of only by the defendants in the eminent domain proceedings; or whether it is an essential step in the proceedings which must be commenced in time in order to justify an assessment. The general rule is that all proceedings of any benefit to the parties assessed must be followed. The limitation may be of benefit to the owners. Hence it would seem that the latter interpretation is the better. It would seem that the extension must be made before the expiration of the first sixty days.

§ 765. **General Rules Governing the Action.**—Section 6 further provides: "Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." Prior to 1909, the section read, "rules of the Code of Civil Procedure," instead of "provisions." It was held that this did not adopt merely the rules of practice but the other provisions as well.[15] The amendment of 1909 makes this clearer. Thus, it will be presumed that judgment was entered by the clerk within twenty-four hours after the rendition of the verdict, as required by section 664 of the Code of Civil Procedure.[16]

§ 766. **The Complaint.**—The form of complaint in general actions of eminent domain is prescribed by section 1244 of the Code of Civil Procedure. The complaint in actions brought under this act is practically the same. Section 7 provides: "The complaint shall set forth, or state the effect of, the ordinance of intention, and the ordinance ordering the improvement, but need not set up any other proceed-

[15] City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17.
[16] Title Ins. & Trust Co. v. Lusk, 12 Cal. App. Dec. 199.

ings had before the bringing of the action." In other respects the complaint must conform to the requirements of the Code of Civil Procedure. It is competent for the legislature to prescribe the form of complaints.[17] No constitutional provision is violated by such a rule as that laid down in this section.

§ 767. **Ordinances as Evidence of Necessity.**—Section 7 further provides: "Such ordinances shall be conclusive evidence, in such action, of the public necessity of the proposed improvement, and also that the same is located in the manner which will be most compatible with the greatest public good and the least private injury." This practically confines the field of inquiry to the amount of compensation which may be recovered. The determination of the necessity for taking property is legislative rather than judicial, and the action of the legislative body may be made conclusive.[18]

§ 768. **Invalidity of Ordinances as a Defense.**—It is probable that if the preliminary proceedings are invalid, the action to condemn cannot be maintained. In a case arising under the act of 1889, it was held that a defect in the resolution of intention deprived the council of jurisdiction to order the improvement; and that the action could not in such a case be upheld under the general provisions of the Code of Civil Procedure.[19] It is probable that this principle would be held applicable here.

§ 769. **Trial—Appointment of Referees.**—Section 8 provides a special procedure for determining the amount of damages. "When all parties defendant to the action have answered, or have been served with summons, and their default entered, the plaintiff or any party defendant to the

17 See City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

18 See ante, sec. 727. See, also, Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

19 City of Los Angeles v. Dehail, 97 Cal. 13, 31 Pac. 626.

action whose default has not been so entered, may, upon five days' notice to the parties, except defendants in default, move the court to set the action for trial. If, upon the hearing of such motion, a trial by jury or by the court without a jury is not demanded by the defendants, or any of them, or by the plaintiff, such trial shall be deemed to be waived, and the court must appoint three disinterested persons referees, to ascertain the compensation to be paid to such defendants so waiving a trial by jury, or by the court without a jury. Such referees must be residents of the municipality where such improvement is to be made, and over the age of twenty-one years, and must take and file with the court an oath to discharge their duties faithfully and impartially. If any of such referees fails to qualify, or resigns, or is removed by order of court, or is or becomes unable to act, the vacancy so created shall be filled by the court."[20]

§ 770. **Duties of Referees.**—The duties of the referees are quite similar to the duties of the commissioners under the act of 1889, although the duties under this act are confined to the assessment of damages. Section 9 provides: "The referees shall at once proceed to view the land sought to be condemned, and ascertain the compensation proper to be paid to such of the parties interested in each parcel thereof as have waived a trial by a jury, or by the court. They shall have power to examine witnesses under oath, to be administered by any of them, and may have subpoenas issued by the clerk of the court, requiring the attendance of witnesses, or the production of evidence before them. They shall make and file with the court a written report of their findings, and of their necessary expenses, within thirty days after the date of their appointment; provided, however, that the time so allowed may be extended, upon good cause shown, by the court or judge thereof, but such extension shall not exceed ninety days; and provided, fur-

[20] As to the commissioners under the act of 1889, see ante, sec. 685 ff.

ther, that if any vacancy in the referees is created and filled as provided in section 8 of this act, or if new referees are appointed, or if a new report from the same referees is ordered, as provided in section 11 of this act, the time herein specified for the filing of such report shall be deemed to be thirty days from the date of the order filling such vacancy, or appointing new referees, or ordering a new report from the same referees, and the same may be extended accordingly, as above provided. Any two of such referees who agree thereto, may make such report."[21]

§ 771. **Time at Which Right to Damages Accrues.**—In 1909 section 10 was amended by the addition of provisions fixing the time at which the right to compensation accrues. Prior to that time it was held that section 1249 of the Code of Civil Procedure, fixing the time as of the date of the issuance of the summons, governed.[22] That provision has been held constitutional;[23] and it would seem that the present provision is clearly valid. It reads: "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act. No improvements placed upon the property proposed to be taken, subsequent to the date of the publishing of the notice of the passage of the ordinance of intention, shall be included in the assessment of compensation or damages."

§ 772. **Rules for Ascertaining Damage.**—Section 10 further states the rules governing the ascertainment of the

[21] As to the duties of the commissioners under the act of 1889, see ante, sec. 687 ff.

[22] City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17.

[23] City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17.

amount of damage. "The referees, or court, or jury, as the case may be, shall find separately: First. The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein; Second. If any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Such damages must be fixed irrespective of any benefit from such improvement." This is practically the same as the provisions of the Code of Civil Procedure which govern in proceedings under the act of 1889, except that here there is an express provision that benefits shall not be considered. The method of determining the amount of damages has been discussed in the chapter dealing with the act of 1889.[24]

§ 773. **Hearing on Report—Rights of Parties to Action.** Section 11 provides: "Upon the filing of such report the court must, upon motion of any party, appoint a day for hearing the same, not less than twenty days thereafter. Notice of the time and place of said hearing must, at least ten days before the time so appointed, be served on all the other parties, except defendants whose default has been entered." This clearly contemplates a service in the same manner in which ordinary notices of trial are served. "The plaintiff, or any defendant who has answered, may file exceptions in writing to said report, specifying the grounds upon which such exceptions are based, at any time within not less than one day prior to the hearing; and any such party so filing exceptions to said report, may appear at the hearing of said report and contest the same."[25] There is no requirement that such exceptions be served upon the

[24] See ante, secs. 729, 730.

[25] Prior to 1909, the exceptions could be filed up to the day of hearing: See Scheerer v. Hutton, 7 Cal. App. 524, 94 Pac. 849.

other parties.[1] The parties are certainly entitled to introduce evidence as to the value of the property to be taken. The hearing amounts to a trial by the court of the issues involved. "After hearing the report, and any exceptions thereto, the court may confirm the report, or may modify it and confirm it as modified, or may set it aside and order a new report from the same referees, or from new referees to be appointed. If new referees are appointed, the same proceedings shall be had as upon the first reference." It would seem that, if a new report is ordered by the same referees, the same notice and hearing should be given as is provided for in the first instance. The court may modify the report by changing the amount awarded to any owner, although such owner has made no complaint.[2] The court may pass upon the title and determine the rights of the claimants.[3]

§ 774. Same—Rights of Owners Liable to be Assessed. A feature of the action is the right of property owners liable to assessment to intervene and be heard. Section 11 provides: "In addition to the notice hereinbefore provided, the clerk of the court must give notice of the filing of said report, and of the time and place appointed for the hearing of the same, to all persons owning or having an interest in any property included within the assessment district for said improvement described in the ordinance of intention, by causing said notice last mentioned to be published for five days in a daily newspaper published and circulated in the city; and, if there be no such daily newspaper, then by two insertions in a weekly newspaper so published and circulated. Any publication of such notice shall commence at least ten days before the time appointed for the hearing

1 In Scheerer v. Hutton, 7 Cal. App. 524, 94 Pac. 849, notice of the filing of the exceptions was given to all the parties interested. There is no such requirement in the statute, however.

2 Scheerer v. Hutton, 7 Cal. App. 524, 94 Pac. 849.

3 Thus, in Scheerer v. Hutton, 7 Cal. App. 524, 94 Pac. 849, the court disallowed an amount awarded a lessee and allowed the full amount to the owner of the fee. See section 33 as amended in 1911.

of the report. Said notice shall require all persons owning or having an interest in any property included within said assessment district for said improvement to intervene in said action, and file, in the office of the clerk of said court, his exceptions in writing to said report, if any he has, specifying the grounds upon which such exceptions are based. Said notice shall also contain a description of the said assessment district as set forth in the ordinance of intention. At any time within not less than one day prior to the hearing, any person not a party to the action, owning or having an interest in any property included within said assessment district, may intervene in the action, and file his exceptions in writing to said report, specifying the grounds upon which such exceptions are based; and any such person so intervening may appear and contest the said report, and introduce evidence in support of such exceptions." These provisions were added to the act by the amendment of 1909. It is to be noted that this does not limit the owners as to what exceptions they may file. In the next paragraph, however, it is provided that, in case of trials in court, the owners liable to assessment may introduce evidence relative to the compensation and damages to be awarded. Ordinarily, this is the only matter before the court in which such parties are interested. There is no reason why there should be any different rule where the compensation is determined in the first instance by referees. It is probable that in such cases such owners will be limited to the same matters. If the owners fail to object to the amount of compensation awarded, they cannot subsequently question it.[4]

§ 775. Intervention of Owners Liable to Assessment in Case of Trial in Court.—The owners liable to assessment are entitled to intervene also in cases tried before the court. Section 11 further provides: "If there be a trial of the action by a jury, the clerk of the court must give notice of the time and place of such trial to all persons owning or

[4] Pierce v. City of Los Angeles, 12 Cal. App. Dec. 474 (decided March 24, 1911).

having an interest in any property within said assessment district for said improvement. Said notice shall be published in the same manner and for the same time as the notice hereinbefore in this section required to be given by said clerk, and shall require all persons owning or having an interest in any property included within said assessment district for said improvement, to intervene in said action, and to appear at the trial thereof and introduce evidence relative to the compensation and damages to be awarded to the defendants therein. At any time within not less than one day prior to the trial, any person not a party to the action, having an interest in any property included within said assessment district, may intervene in the action, and, upon the trial thereof, may appear and introduce evidence relative to the compensation and damages to be awarded to the defendants therein. The cost of the publication of the notices required by this section shall be paid by the plaintiff, and allowed as costs in the action." The provision as to costs is clearly invalid; for as we have already seen, costs cannot constitutionally be taxed against defendants in eminent domain proceedings except in certain exceptional cases.[5]

§ 776. **Notice of Postponements not Required.**—Where notice of the hearing is regularly given, no notice need be given of continuances. This is the ordinary rule relating to court proceedings. Section 11 provides: "When a time has been appointed for hearing the report of the referees, or for the trial of the action, and notice thereof has been given by the clerk by publication as in this section provided, if the hearing or trial be postponed or continued by the court to any subsequent date, no such notice need be given by the clerk of the hearing or trial upon any such postponement or continuance." This seems a useless provision; and it was probably inserted through an overabundance of caution.

5 See ante, sec. 732. See, also, City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56.

§ 777. **Interlocutory Judgment.**—Section 12 provides: "Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the costs allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint. The court shall allow to the referees, as costs to be paid by the plaintiff, a reasonable compensation for their services, the amount of which compensation shall be fixed by the court upon the hearing of the report, and their necessary expenses." As we have already seen, all costs of the proceedings must be paid by the plaintiff, anything in the statute to the contrary notwithstanding.[6] This interlocutory decree merely establishes the right to take the property upon payment of compensation. The constitution prohibits the taking of property before compensation is paid to the owner or into court for him.[7]

§ 778. **Interest not Allowable.**—The owners are not entitled to interest on the amounts awarded as damages. Upon this point the Court of Appeals of the Second District has said, quoting from a case decided by the United States Supreme Court: " 'Interest accrues either by agreement of the debtor to allow it for the use of money, or in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report.

[6] See ante, sec. 732.
[7] See ante, sec. 733.

. . . . It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority.' Until a citizen is deprived of possession of the property sought to be condemned, his right to the use and enjoyment thereof as it stood at the time of commencing the action is in no wise abridged. Therefore, it cannot, in a legal sense, be said that he is damaged until the actual taking of the property."[8]

§ 779. **Appeals.**—Section 13 provides: "An appeal may be taken from such interlocutory judgment within thirty days from the entry thereof, and from any order granting or denying a new trial within ten days after the entry thereof." In regard to this, the Court of Appeals has said: "The statute gives a speedy and adequate remedy through which parties aggrieved may correct any errors of the court or referees; and no appeal being taken, and no motion for a new trial being filed, this court will not, on an application for this writ [of mandate], undertake to direct a court to render a judgment different from the one rendered."[9] An appeal does not stay proceedings.[10]

§ 780. **Abandonment of Proceedings.**—In 1911, section 14 was amended to read as follows: "The city council may,

8 City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17, quoting from Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361, 37 L. Ed. 170. See, also, San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

9 Scheerer v. Hutton, 7 Cal. App. 524, 94 Pac. 849.

10 See Code Civ. Proc., secs. 1254, 1257.

at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice; and if any of the assessments levied to pay the expense of the improvements, as hereinafter provided, shall have been actually paid in money at the time of such abandonment, the same shall be refunded to the persons by whom they were paid. If the proceedings be abandoned or the action dismissed no attorneys' fees shall be awarded the defendants or either or any of them." The right to abandon here given is similar to the right conferred by the original statute. The section was amended in 1909, so as to limit the right to a time prior to the entry of the interlocutory judgment. Under that amendment, it was held that mandamus was a proper remedy to compel the council to proceed with the work.[11] It was held, also, that the amendment applied to all cases which had not proceeded to interlocutory judgment at the time of its adoption.[12] The amendment of 1911, however, provides: "The provisions of this act shall not apply to or affect any proceeding taken under the act to which this act is amendatory, and pending at the time this act takes effect, and in which the interlocutory judgment has been entered."

§ 781. **The Diagram.**—Section 15 provides: "Upon the entry of the interlocutory judgment, the city council shall order the city engineer, or if there be no city engineer, any civil engineer whom it may employ for that purpose, to make and deliver to the street superintendent, a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. Said diagram shall show the land to be taken for the proposed improvement, and also each separate lot, piece or parcel of land within the assessment district, and the dimensions of each such lot, piece, or parcel of land, and the relative

[11] Title Ins. & Trust Co. v. Lusk, 12 Cal. App. Dec. 199.
[12] Title Ins. & Trust Co. v. Lusk, 12 Cal. App. Dec. 199.

location of the same to the proposed improvement." The purpose of this is to give the street superintendent the data from which to make his assessment; and upon the making of the assessment, the diagram is attached thereto and made a part thereof. It is necessary, therefore, that the diagram comply with the provisions of this section. A failure to show the dimensions of the lots, or to show their relative locations, would undoubtedly be fatal to the assessment.[13] Under the Vrooman Act, it is held that the diagram must, in some manner, show the directions; but this need not necessarily be done by means of arrows.[14]

§ 782. **The Assessment—In General.**—Section 16 provides: "The city engineer shall deliver said diagram to the street superintendent, and shall indorse thereon the date of such delivery. The street superintendent upon receiving the said diagram shall proceed to assess the total expenses of the proposed improvement upon and against the lands, including the property of any railroad or street railroad, within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for completing said assessment for a period not exceeding ninety days additional." The assessment must be made in the manner prescribed, or it will be of no avail. It is to be made upon the district plan. It is not necessary to show by what means the proportion of each lot was reached.[15] In fact, this is immaterial. It is a general principle that a railroad right of way is not subject to an assessment unless the statute expressly provides that it shall be.[16] It would seem that under this statute it may be assessed. The eighth

[13] See ante, secs. 212, 213.
[14] See ante, secs. 212, 213.
[15] See ante, sec. 208.
[16] See ante, sec. 187.

subdivision of section 33 provides: "The term 'property of any railroad or street railroad' shall be deemed to include and shall include property owned or controlled by any person, firm or corporation, as a railroad, street railroad or interurban railroad right of way whether such right of way be owned or controlled in fee or as an easement or by virtue of a franchise or otherwise, also the roadbed, ties and rails located on such right of way; and such property shall be assessed and the assessment thereof enforced in the same manner and to the same effect as other lands and property in the assessment district."

§ 783. **Same—What It Shall Include.**—Section 16 is explicit as to what may be included in the assessment. "The total expense of the improvement so to be assessed shall include the amounts awarded to the defendants by the interlocutory judgment in the action for condemnation, together with their costs, the compensation and expenses of the referees, as allowed by the court, and all other costs of the plaintiff in such action, the expenses of making the assessment, and all expenses necessarily incurred by said city, in connection with the proposed improvement, for the publication of ordinances, posting and publication of notices, for maps, diagrams, plans, surveys, searches and certificates of title to the property to be taken, and all other matters incident thereto."

§ 784. **Same—Contents.**—The contents of the assessment are prescribed by section 17. "The street superintendent shall make the said assessment in writing. Such assessment shall describe each lot, piece, or parcel of land assessed for said improvement, and shall designate each such lot, piece, or parcel of land with an appropriate number. The street superintendent shall also designate each such lot, piece, or parcel of land on said diagram, with the number corresponding with the number thereof in said assessment, and said diagram shall thereupon be attached to and become and be deemed to be a part of said assessment.

Such assessment shall show the total sum to be raised thereby, as hereinbefore provided, and also the items of such total sum, and opposite each lot, piece, or parcel of land assessed, the amount assessed thereon, and the name of the owner thereof, if known to the street superintendent; or if the owner's name is unknown, the word 'Unknown' shall be written instead of such name. Any error or mistake in the designation of the owner of any lot, piece, or parcel of land, or in the particulars of his interest therein, shall not affect the validity of the assessment." The purpose of the description is to make certain the property liable. The description need not necessarily be full, if it is sufficient to identify the property. Abbreviations may be used.[17] The assessment should show that the property is within the city; but this is sufficiently shown by the venue in the caption of the assessment.[18] The last sentence makes it unnecessary to make any particular effort to ascertain the name of the true owner. The assessment may be made to anyone named, or to unknown owners, and in either case will satisfy the statute.[19] The assessment should be authenticated by the signature of the street superintendent.[20]

§ 785. **Notice of Filing Assessment.**—Section 18 provides: "As soon as said assessment is completed the street superintendent shall file the same, with the diagram attached thereto and made a part thereof as aforesaid, with the clerk of the city council, who shall give notice of such filing by publication for, at least, ten days in a daily newspaper published and circulated in the city, or if there be no such daily newspaper, by three successive insertions in a weekly newspaper so published and circulated. Said notice shall require all persons interested to file with said clerk their objections, if any they have, to the confirmation of

17 See Baird v. Monroe, 150 Cal. 560, 89 Cal. 352.
18 See Whiting v. Quackenbush, 54 Cal. 306.
19 Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377.
20 See ante, sec. 214.

said assessment, within thirty days after the date of the first publication of such notice, which date shall be stated in said notice." This is the only notice that is required for the filing of the assessment and the hearing of the objections. No other notice is necessary.[21]

§ 786. **Objections to Assessment.**—The only requirements for objections, as stated in section 19, are that they "shall be in writing and shall be filed with said clerk within the time prescribed in the notice required by section 18 hereof." The objections need not be in the form prescribed by section 4 for protests. In general, protests and objections are liberally construed.[22]

§ 787. **Hearing and Determination on Objections.**—Section 19 provides: "The clerk shall, at the next regular meeting of the city council after the expiration of the time for filing objections, lay said assessment and all objections so filed with him, before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment, and may confirm, modify, or correct said assessment, or may order a new assessment, upon which like proceedings shall be had, as in the case of an original assessment; or if there be no objections, the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment, and the action of the council upon such objections and assessment shall be final and conclusive in the premises." No notice of the hearing is necessary, other than the published notice of the filing of the assessment.[23] The objectors are chargeable with notice that their objections will be heard at the next regular meeting of the city council after the

[21] Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

[22] See ante, sec. 102.

[23] Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

expiration of the thirty days within which to file objections, or at such other time to which such hearing may at such meeting be adjourned. It is their duty to be present at such meeting.[24] If the council fails to take action at the next regular meeting after the expiration of the time for filing objections, either in the way of according a hearing or adjourning the hearing to some subsequent day, it loses jurisdiction to act in the matter, except upon a republication of the notice in accordance with the provisions of section 18 of the act.[25] The hearing must not be had nor adjourned prior to the time fixed.[1] The hearing is jurisdictional. An assessment confirmed without such hearing upon objections is invalid.[2] The provision that the decision of the council shall be final and conclusive applies only to such matters as the council may remedy upon the hearing. It does not cure jurisdictional defects.[3]

§ 788. **Record of Assessment—Accrual of Lien.**—Section 20 provides: "The clerk of the council shall thereupon deliver to the street superintendent the assessment as confirmed by the city council, with his certificate of such confirmation, and of the date thereof. The street superintendent shall thereupon record such assessment and diagram in his office, in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment-roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment-roll. Immediately upon such recording, the several assessments contained in such assessment-roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made." Both the recording of the

24 Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

25 Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692.

1 See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

2 See Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150.

3 See ante, secs. 251–265.

assessment and the making of a certificate thereof are essential steps in the proceedings and must follow the statutory requirements in order that the assessment may be valid.[4]

§ 789. **Right of Owner of Property Taken to Setoff.**—Section 21 merely authorizes an owner of property taken to set off damages against benefits assessed, without actually paying over any money. "The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for nonpayment thereof as hereinafter provided, demand of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessment shall be marked 'Paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money, and the assessments shall, on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money. In either case, as a condition of the offset, such person must execute to the city and deliver to the street superintendent duplicate receipts for such part of the amount due him under said interlocutory judgment as is offset against such assessments, penalties, and costs. One of said duplicate receipts shall be filed by the street superintendent in his office, the other shall be filed with the clerk of the superior court, and on such filing, the city shall be entitled to a satisfaction pro tanto of said interlocutory judgment."

§ 790. **Collection of the Assessment—In General.**—The procedure for the collection of the assessment is similar to

[4] See ante, sec. 220.

that prescribed by section 16 of the act of 1889.[5] Section 22 provides: "The street superintendent shall, upon the recording of said assessment, give notice, by publication for ten days in a daily newspaper, published and circulated in such municipality, or by three successive insertions in a weekly newspaper, so published and so circulated, that said assessment has been recorded in his office, and that all sums assessed therein are due and payable immediately, and that the payment of the said sums is to be made to him within thirty days after the date of the first publication, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto. When payment for any assessment is made, the street superintendent shall mark opposite such assessment the word, 'Paid,' the date of payment, and the name of the person by or for whom the same is paid, and shall, if so requested, give receipt therefor. On the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment-roll, and mark each such assessment, 'Delinquent,' and add five per cent to the amount of each assessment delinquent." Under the general tax law, it is held that a somewhat similar provision as to notice is not mandatory.[6] Under this act, however, the time when assessments shall become due depends upon the publication. Hence it seems clear that the notice must be given in the manner prescribed in order that collection may be enforced.

§ 791. **Publication of the Delinquent List.**—Section 23 provides: "The street superintendent shall, within ten days from the date of such delinquency, begin the publication of a list of the delinquent assessments, which list must contain

[5] See ante, sec. 703 ff.

[6] Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549.

a description of each parcel of property delinquent, and opposite or against each description, the name of the owner as stated in the assessment-roll, and the amount of the assessment, penalty, and costs due, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece, or parcel of land, separately assessed. The street superintendent shall append to and publish with said delinquent list a notice that unless each assessment delinquent, together with the penalty and costs thereon, is paid, the property upon which such assessment is a lien, will be sold at public auction at a time and place to be specified in the notice. The publication must be made for a period of ten days, in some daily newspaper published and circulated in the municipality, or for three weeks in a weekly newspaper so published and circulated. The time of sale must not be less than five days, nor more than ten days, after the expiration of the period of publication of said list, and the place of sale must be in, or in front of, the office of the street superintendent." This provision is similar to the provision for publication of the delinquent list in matters of general taxation. Accordingly, many of the cases relating to general taxation are authorities upon the procedure here prescribed. Thus, it is held that the enumeration of the particulars which must be contained in the notice is equivalent to a declaration that none other need be published.[7] The description of the property need not be identical with that in the assessment, provided it is sufficient to identify the property.[8] Abbreviations may be used in the description.[9] A failure to state the names of the owners assessed is fatal to the notice.[10] Of course, where the assessment is made to unknown owners, it is sufficient so to state in the notice.

§ 792. **Right to Pay Before Sale.**—Section 24 provides: "At any time after such delinquency, and prior to the sale

7 Davis v. Pacific Improvement Co., 137 Cal. 245, 70 Pac. 15.

8 Davis v. Pacific Improvement Co., 137 Cal. 245, 70 Pac. 15.

9 Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Rollins v. Woodman, 117 Cal. 516, 49 Pac. 455.

10 Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301.

of any piece of property assessed and delinquent, any person may pay the assessment on such piece of property, together with the penalty, and costs then due, including the cost of advertising, if such payment is made after the first publication of the list of delinquent assessments. The street superintendent shall thereupon mark such assessment 'Paid,' as hereinbefore provided."

§ 793. **Sale for Delinquency.**—Section 25 provides for the sale. "On the day fixed for the sale, the street superintendent must, at the hour of ten o'clock A. M., commence the sale of the property advertised, commencing at the head of the list, and continuing in the numerical order of lots or parcels of land until all are sold; provided, that he may postpone or continue the sale from day to day until all the property is sold. Each lot, piece, or parcel of land separately assessed must be offered for sale separately, and the person who will take the least quantity of land, and then and there pay the amount of the assessment, penalty, and costs due, including fifty cents to the street superintendent for a certificate of sale, shall become the purchaser. In case there is no purchaser for any lot, piece or parcel of land so offered for sale, the same shall be struck off to the municipality, as purchaser, and the city council shall appropriate out of the general fund of the treasury, the amount required for such purchase, and shall order the city treasurer to place the same in the special fund for such improvement. No charge shall be made for the certificate of sale when the municipality is the purchaser." While this section has not been interpreted by the courts, similar provisions have. A sale can be made only in the manner and under the circumstance authorized. Hence it is held that a sale for more than the amount due is void and will not pass title.[11] The mere fact, however, that the certificate and the deed differ

[11] Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Harper v. Rowe, 53 Cal. 233; Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

in their recitals as to the sum does not invalidate the sale.[12] When the municipality purchases, it must actually transfer the money to the special fund. The purpose of the sale is to obtain money for a particular purpose. If the money were not actually transferred, the purpose of the sale would be avoided, for there would not be funds on hand to pay the amount of the interlocutory judgments.

§ 794. **Certificate of Sale.**—Section 26 provides: "After making the sale, the street superintendent must execute, in duplicate, a certificate of sale setting forth a description of the property sold, the name of the owner thereof, as given on the assessment-roll, that said property was sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which such property was sold, the date of sale, the name of the purchaser, and the time when the purchaser will be entitled to a deed. The street superintendent must file one copy of such certificate in his office, and deliver the other to the purchaser, or if the municipality is the purchaser, to the clerk of the council, who shall file the same in his office. On the filing of the copy of such certificate in the office of the street superintendent, the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property, as in this act provided. The street superintendent shall also enter on the assessment-roll, opposite the description of each piece of property offered for sale, a description of the part thereof sold, the amount for which the same was sold, the date of the sale, and the name of the purchaser." To be valid, the certificate must contain all the matters enumerated in the section. The description must be sufficient to identify the property.[13] The term of redemption should be stated as the concurrent happening of the giving of notice of application for a deed and the expiration of one year.[14] A failure to state the name of the

[12] Doland v. Mooney, 79 Cal. 137, 21 Pac. 436.

[13] Miller v. Williams, 135 Cal. 183, 67 Pac. 788. See, also, Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

[14] Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

owner named in the assessment makes the certificate void. The certificate should be dated as of the day of sale, but may be made out later and take effect by relation where this will not deprive the owner of any rights.[15]

§ 795. **Redemption from Sale.**—Section 27 provides: "A redemption of any parcel of property sold for delinquent assessment may be made by any party in interest, at any time prior to the execution and delivery of a deed therefor, by paying to the street superintendent the amount for which the property was sold, and in addition thereto, ten per cent thereon if paid within three months from the date of sale; twenty per cent if paid within six months; thirty per cent if paid within nine months; forty per cent if paid within twelve months, or fifty per cent if paid at any time after twelve months. When redemption is made, the street superintendent shall note that fact on the duplicate certificate of sale on file in his office, and deposit the amount paid with the city treasurer, who shall credit the purchaser named in the certificate of sale with the said amount, and pay the same to such purchaser, or his assignee, upon the surrender of the certificate of sale, and upon satisfactory proof of assignment thereof, if any. When the municipality is the purchaser, the treasurer shall notify the clerk of the council of the redemption, and such clerk shall thereupon cancel the certificate of sale on file in his office."

§ 796. **Notice of Application for Deed—In General.**—Before applying for a deed, the purchaser must give notice of his intention to do so. Section 28 provides: "The purchaser or his assignee must, at least thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth a description of the property, that said property has been sold for a delinquent assessment (specifying the improvement for which the same was

[15] Maina v. Elliott, 51 Cal. 8.

made), the amount for which it was sold, the amount necessary to redeem at the time of giving notice, and the time when such purchaser or assignee will apply to the street superintendent for a deed. If the said owner cannot be found, after due diligence, said notice must be posted in a conspicuous place upon said property, at least thirty days before the time stated therein, at which the application for a deed will be made. The person applying for a deed must file with the street superintendent an affidavit or affidavits showing that notice of such application has been given, as herein required, and if the notice was not served on the owner of the property personally, that due diligence was used to find said owner; which affidavit or affidavits must be filed by the street superintendent in his office. If redemption of the property is made after such affidavits are filed, and more than eleven months from the date of sale, the person making such redemption must pay, in addition to the other amounts required, three dollars for the service of notice and the making of such affidavits, which amount shall be paid over to the purchaser or his assignee in the same manner as other sums paid for redemption. No deed for any property sold for delinquent assessment shall be made until the purchaser or his assignee has complied with all the provisions of this section, and filed the proper affidavits with the street superintendent."[16]

§ 797. **Same—Contents of the Notice.**—Inasmuch as the statute makes both the notice and proof thereof conditions precedent to the right to a deed, it follows that the statutory requirements must be substantially followed. These provisions are quite similar to those of the former tax law, which govern in sales under the Street Opening Act of 1889.[17] Decisions under that part of the former tax law are, in most particulars, applicable here. Thus, it is held that the notice must contain all the matters specified by the

[16] For a discussion of the similar provision of the Street Opening Act of 1889, see ante, secs. 714–716.

[17] See ante, secs. 714–716.

statute. A notice which fails to state that the property has been sold for a delinquent assessment, or which does not state the date of sale, nor the amount for which the property was sold, is insufficient.[18] The notice must specify the correct amount for which the property was sold.[19] A notice which states a larger amount due than is legally due is insufficient.[20] The date fixed for application for a deed must be fully thirty days after the date of service.[21] It is not necessary that the notice be dated.[22]

§ 798. **Same—Service and Proof Thereof.**—The provision as to service differs from the provision of the former tax law.[23] Under this act, the notice must be served both on the owner and upon the occupant. In case the owner cannot be found, after due diligence, the notice must be served upon the occupant and posted on the property. It must be served thirty days before the day fixed for application for a deed. The time is computed in the usual manner of excluding the first day and including the last.[24] Legal proof of service is as essential as the service itself.[25] The affidavits must show the facts, so that an inspection will be sufficient to determine whether the service has been properly made.[1] Where the owner cannot be found, the affidavit should allege facts showing due diligence. A mere allegation that due diligence had been used is not sufficient.[2]

18 Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573.

19 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

20 Reed v. Lyon, 96 Cal. 501, 31 Pac. 619. But the fact that it states, in addition to the amount due, that three dollars will be due for service of notice, is immaterial: Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

21 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

22 Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

23 See ante, sec. 716.

24 Landregan v. Peppin, 86 Cal. 122, 24 Pac. 859.

25 Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761; Hall v. Capps, 107 Cal. 513, 40 Pac. 809; Miller v. Williams, 135 Cal. 183, 67 Pac. 788..

1 Id.

2 Hennessy v. Hall (Cal. App.), 113 Pac. 350. This is also the rule as to affidavits for publication of summons: See Ricketson v. Rich-

§ 799. **The Deed.**—Section 28 provides: "At any time after the expiration of twelve months from the date of sale, the street superintendent must execute to the purchaser, or his assignee on his application, if such purchaser or assignee has complied with the provisions of this section, a deed of the property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof and the fact that no person has redeemed the property. The street superintendent shall receive from the applicant for a deed, one dollar for making such deed, unless the municipality is the purchaser, in which case no charge shall be made therefor." Inasmuch as the form is prescribed, it must be followed.[3] Thus, a failure to state the amount paid for the land makes the deed void,[4] as does also a failure to state the time when the purchaser is entitled to a deed.[5] A defective deed cannot be cured by a reference to the certificate of sale.[6]

§ 800. **Effect of Deed as Evidence.**—Section 29 provides: "The deed of the street superintendent shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee." The fact that the deed is prima facie evidence makes it admissible in evidence without preliminary proof of the regularity of the proceedings.[7] It does not, however, prevent an owner from setting up a defect in the proceedings which renders the deed void.[8] Of course, in order to have any weight as evidence the deed must be valid on its face.

ardson, 26 Cal. 149; Ligare v. California S. R. R. Co., 76 Cal. 613, 18 Pac. 777; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698.

[3] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[4] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[5] Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573. But see Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287.

[6] Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761.

[7] Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

[8] Clarke v. Mead, 102 Cal 516, 36 Pac. 862.

§ 801. **Payment by Street Superintendent to City Treasurer.**—Section 30 provides: "The street superintendent shall, from time to time, pay over to the city treasurer all moneys collected by him on account of any assessment made under the provisions of this act. The city treasurer shall on receipt thereof, place the same in a special fund, designating such fund by the name of the improvement for which the assessment was made." This provision is substantially the same as the requirement of the Street Opening Act of 1889.

§ 802. **Payment of Judgments, and Condemnation.**—Section 31 provides: "As soon as there is sufficient money in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the amounts awarded to the defendants by the interlocutory judgment in the action of condemnation, or such parts thereof as have not been paid by offset against assessments, as hereinbefore provided, the said amounts shall be paid to the parties entitled thereto, or into court for their benefit. On satisfactory proof being made to the court of payment of the amounts awarded by the interlocutory judgment to the respective parties entitled thereto, or into court for their benefit, it shall direct the interlocutory judgment to be satisfied, and shall make and enter a final judgment, condemning the lands described in the complaint to the use of the plaintiff for the purposes specified in such complaint." As we have already seen, the constitution forbids the taking of property until compensation is either paid to the owner or paid into court for him.[9] It is not sufficient to give security for payment.[10] Hence, it is not until the money has been paid as in this section provided, or has been paid by offset, that the city is entitled to enter upon the land and make the improve-

[9] Steinhart v. Superior Court, 137 Cal. 575, 92 Am. St. Rep. 183, 70 Pac. 629, 59 L. R. A. 404.

[10] Steinhart v. Superior Court, 137 Cal. 575, 92 Am. St. Rep. 183, 70 Pac. 629, 59 L. R. A. 404.

ment. An appeal does not prevent the city from going into possession.[11]

§ 803. **Procedure in Case of Deficiency.**—Section 32 provides: "In case of a deficiency in the fund for such improvement, the city council, in its discretion, may provide for such deficiency by an appropriation out of the general fund of the treasury, or by ordering a supplementary assessment to be made by the street superintendent upon the property in said assessment district in the same manner and form, and subject to the same procedure as the original assessment, and in the last-named case, in order to avoid delay, the city council may advance such deficiency out of the city treasury and reimburse the treasury from the collections under such supplementary assessment." The provision for payment of the whole deficiency out of the city treasury has been held to authorize the city council to provide for the issuance of bonds for the purpose under the Municipal Improvement Act of 1901.[12]

§ 804. **Disposition of Surplus.**—Section 32 provides: "In case of a surplus in the fund for such improvement, the city council may order such surplus refunded pro rata to the parties who paid the assessments."

11 See Code Civ. Proc., secs. 1254, 1257.

12 City of San Diego v. Potter, 153 Cal. 288, 95 Pac. 146.

PART IV.

STREET WORK UNDER CITY CHARTERS.

CHAPTER I.

CITIES NOT ADOPTING A COMPLETE SYSTEM.

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§ 805. **Effect of Charter Provisions Prior to 1896.**—Prior to 1896 the state constitution provided that all cities and towns "shall be subject to and controlled by general laws." A street opening or improvement act, applicable generally to cities and towns throughout the state, is a general law.[1] Hence it was held that such general laws control, notwithstanding the existence of charter provisions upon the same matters.[2] Until a general law was passed, however, such charter provisions were valid.[3] Thus, no general street opening act was passed after the adoption of the new constitution until 1889. Hence, charter provisions as to street opening, adopted prior to 1889, were valid when passed. When a general law was passed controlling the same matter, it superseded the charter provisions.[4] Charter provisions adopted at a time when general laws covering the same matters were in force were void from the beginning.[5]

[1] Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771.

[2] See cases cited in last note.

[3] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309 (dictum); German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 (dictum).

These cases are contra to a dictum in Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20, where it is said that the constitutional provision itself revoked the authority of the city. "For convenience, this power of the state is frequently vested in the municipality; but unless so invested it remains in the state; when so vested the municipality acts as the agent of the state. It is from the state only that a municipality has power to levy an assessment on property for street work. In the absence of a delegation of such power, its efforts in that direction would be futile. When by the act of 1872 that power was delegated to the authorities of the city and county of San Francisco, the action of the authorities rested solely on that delegated authority. When the constitution of 1879 went into effect, that delegated authority was, as to the questions in this case, revoked by the people in their sovereign capacity."

Compare Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. See, also, Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

[4] See Byrne v. Drain, 127 Cal. 663, 60 Pac. 433.

[5] See Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

§ 806. **Effect of Amendment of 1896.**—In 1896, article XI, section 6, of the constitution was amended by inserting the words "except in municipal affairs." It now provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." The opening and improving of streets are municipal affairs.[6] It follows that charter provisions prescribing a procedure for such work adopted since 1896 take precedence over general laws.[7] In determining the effect of the amendment upon charter provisions adopted prior to that time, we must distinguish between charter provisions adopted while general laws were in force and those adopted before the adoption of general laws. It has been held that provisions adopted while general laws were not in force were valid when passed, were merely suspended by the general law, and hence when the constitutional restriction was removed, came into force again.[8] On the other hand, provisions adopted after 1879

[6] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Sinton v. Ashbury, 41 Cal. 525.

[7] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433. See, also, Law v. City and County of San Francisco, 144 Cal. 384, 77 Pac. 1014.

[8] "It is to be borne in mind that the case which we are considering is not one where the provisions of a charter, when the charter becomes a law, are in conflict with existing general laws, but it is the case of charter provisions admittedly valid at the time of their adoption coming in conflict with the provisions of a general law subsequently passed. The constitution does not declare that the provisions of the charter under such circumstances are repealed or annulled. It declares merely that the charter provisions shall be subject to and controlled by general laws. . . . . The very idea of being subject to or controlled by a higher power or law necessarily implies the continued existence of the thing controlled or subjected so long as the control or subjection continues. . . . . The situation thus presented is not dissimilar to that which obtained during the existence of the National Bankruptcy Act. It was competent for this state to pass an insolvency act while the Bankruptcy Act of the United States was in force, but the operation of the state law was suspended, and the state law was controlled by the federal act": Byrne v. Drain, 127 Cal. 663, 60 Pac. 433.

and prior to 1896, while general laws for the same work were in force, were void when passed, and were not made valid by the constitutional amendment.[9] A charter procedure is exclusive, except where it expressly authorizes the use of the general law. Hence, a proceeding taken under the general law when a charter prescribes a valid and exclusive procedure is void.[10]

§ 807. Same—Upon Towns Acting Under Valid Special Acts of the Legislature.—Under the constitution of 1849, the legislature was authorized to incorporate cities and towns by special act. It is held that the "municipal affairs" amendment is applicable to cities and towns now existing under such special acts.[11] Such cities and towns are not now subject to or controlled by general laws, so far as municipal affairs are concerned.[12] While it has not been expressly decided, it would seem that the effect of general laws prior to 1896 upon such special acts was the same as the effect of such laws on prior freeholders' charters, that they merely suspended the operation of the provisions of the special acts. If this is so, the amendment of 1896 revived the charter provisions; and all street work should be done in accordance with the procedure provided by them. Assuming that this is true, I have discussed the procedure so provided in later chapters. The towns affected are Alviso, Gilroy, Marysville, Nevada City, and Santa Clara.

§ 808. General Laws Apply When No Charter Provision.—The general laws relating to street work apply when there is no charter provision authorizing street work. In discussing the application of general laws, Mr. Justice

[9] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

[10] See Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

[11] Ex parte Helm, 143 Cal. 553, 77 Pac. 453; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644; Popper v Broderick, 123 Cal. 456, 56 Pac. 53.

[12] Ex parte Helm, 143 Cal. 553, 77 Pac. 453.

Harrison, in Fragley v. Phelan,[13] said: "A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature. If, in framing its charter, its board of freeholders should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city. It is not within the constitutional power of the legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter. If, by adopting a charter which failed to give to it power to act upon affairs which are properly municipal, a city could be freed from any legislative control in reference to those affairs either by itself or by the legislature, that city would become a veritable Alsatia. Under these considerations it must be held that the exception in the above clause in section 6 of article XI, placed there by the amendment of 1896, applies only to such municipal affairs as are within the power of the particular municipality to perform, and that every city in the state is subject to and controlled by general laws relating to municipal affairs, unless, by virtue of some provision of the charter under which it exists and is acting, such municipal affairs may be engaged in and performed by it." In a recent case, these principles have been expressly held applicable to street work.[14]

§ 809. **Effect of Charter Authority to Do Street Work Where No Procedure Prescribed.**—Some of the charters of

[13] 126 Cal. 383, 58 Pac. 923. Two other justices concurred in this opinion. The other justices also concurred in the judgment, but did not mention this point. See, also, Dinan v. Superior Court, 6 Cal. App. 217, 91 Pac. 806.

[14] See Clouse v. City of San Diego (Cal.), 114 Pac. 573 (decided March 8, 1911).

California cities empower the city and the legislative body, in general terms, to do street work, but do not prescribe the procedure by which such work shall be done. In such cases, the provisions of the general law must be followed. In a recent case, the Supreme Court said: "Counsel for appellants maintain that as the charter does provide for the levy of taxes by the common council to carry on the different departments of the municipal government; gives the council authority to open, close, widen, lay out and otherwise deal with public highways; and establishes a street fund from which shall be paid all expenses for street improvements not otherwise provided for in the charter, that there is ample authority for the construction of streets out of the ordinary revenue of the city without the help of section 26 of the Vrooman Act or any other provision of general law. Whether we regard the authority to raise the fund as being derived from the charter which has adopted the method of the Vrooman Act, or from that general statute itself, the fact remains that no scheme of expenditure has been provided in the charter for the payment of this money, and we are convinced that the statute of 1901 must be followed and the work must be done according to contract as therein commanded. While the charter does confer certain powers upon the common council in the matter of laying out and repairing streets and the like, no rules are made by charter for the payment of the money used in such improvement." [14a]

§ 810. Operation of Charters—In General.—But few of the cities and towns of the state have adopted complete charter systems for street work. Many, however, have limited the operation of the general laws to a greater or less degree. In the following sections, I shall point out the operation of the charter provisions of the cities which do not adopt an independent scheme.

[14a] Clouse v. City of San Diego (Cal.), 114 Pac. 573 (decided March 8, 1911).

§ 811. **Same—Alameda.**—The charter of Alameda expressly provides that "the improvement, widening and opening of streets, the planting of trees, and all other matters not specified in this charter, shall be done, and assessments therefor levied, in conformity with and under the authority conferred by general law."[15] Hence, all the statutes for the purposes specified are applicable.

§ 812. **Same—Berkeley.**—The Berkeley charter expressly adopts the general laws in force at the time of the improvement for all improvements except opening, widening, extending, straightening or closing streets, in all cases where the expense is to be paid by special assessment.[16] It also adopts such general laws for opening, extending, widening, straightening or closing streets where the expense is to be paid by special assessment, "except that all the duties of the commissioners and secretaries shall be performed by or under the direction of the commissioner of public works of the city who shall receive no compensation therefor."[17] The exception is clear and needs no discussion.

§ 813. **Same—Eureka.**—The Eureka charter confers general authority to do street work and provides that "all improvements, actions, proceedings, matters, and things not otherwise provided for in this charter, shall be taken, had, and conducted under, and in pursuance of the provisions of the laws of the state of California applicable thereto, in force at the time such improvements, actions, proceedings, matters, and things are taken and had."[18] This charter was adopted in 1895, prior to the constitutional amendment

[15] See Alameda Charter, art. XII, sec. 7; Stats. 1907, p. 1051. See charter provisions in the Appendix, post.

[16] See Berkeley Charter, sec. 49, subd. 43; Stats. 1909, p. 1208. See charter provisions in Appendix, post.

[17] See Berkeley Charter, sec. 49, subd. 44; Stats. 1909, p. 1208. See charter provisions in Appendix, post.

[18] See Eureka Charter, sec. 191; Stats. 1895, p. 351. See charter provisions in Appendix, post.

of 1896. Hence, independently of this provision, the general law prevails.[19]

§ 814. **Same—Fresno.**—The Fresno charter confers general authority to do street work. There is no express adoption of the general law; but section 48 expressly provides that the superintendent of streets shall have the power and perform the duties prescribed by the Vrooman Act, "or by any acts amendatory thereof, supplementary thereto, or substituted therefor." And section 274 provides in part that "all acts of the legislature relating to the city, and all city ordinances, resolutions and other regulations now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority."[20] It is clear that street work may be done in this city under any of the general laws.

§ 815. **Same—Grass Valley.**—The Grass Valley charter was adopted in 1893, so its provisions as to street work, conflicting with general laws, are invalid.[21] General authority to do street work is conferred.[22] An attempt is made to authorize a special procedure for sidewalk work.[23] The general laws are clearly applicable in this city.

§ 816. **Same—Long Beach.**—The charter of Long Beach expressly adopts the provisions of the general law relating to street work,[24] with certain exceptions. The exceptions are identical with those prescribed by the Los Angeles charter. All powers conferred upon the council by general laws in regard to the advertising for bids, award of contracts,

19 See ante, sec. 806.

20 Stats. 1901, p. 832. See charter provisions in Appendix, post.

21 See ante, sec. 805.

22 See art. VII, sec. 1 of the Grass Valley Charter; Stats. 1893, p. 639. See charter provisions in Appendix, post.

23 See art. VII, sec. 2 of the charter.

24 Long Beach Charter, art. VIII, sec. 1; Stats. 1907, p. 1176. See charter provisions in Appendix, post.

fixing time for work, fixing the amount of bonds, and granting extensions of time are conferred upon the board of public works. That board also has the powers conferred by law upon the mayor to approve awards of contracts. In cases of change of grade, it acts as the commission to assess benefits, damages and costs. The president of the board of public works performs all the duties of the mayor pertaining to the approval and fixing of the amount of contractors' bonds. The secretary of the board of public works performs all duties of the city clerk relating to the receipt, care and custody of bids and of checks and bonds accompanying the same.[25] This merely transfers certain powers and duties from one set of officials to another. It does not otherwise affect the manner in which those duties shall be performed.

§ 817. **Same—Los Angeles.**—The Los Angeles charter, as adopted in 1889, prescribed a complete scheme for street opening and for street improvement. The procedure for street opening was adopted prior to the Street Opening Act of 1889, was valid when passed, was merely suspended by the general law, and came into force again upon the passage of the amendment of 1896.[1] The procedure for street improvement, on the other hand, was in conflict with the Vrooman Act at the outset, hence was void from the beginning, and was not affected by the amendment of 1896.[2] The provisions for both schemes were, however, repealed in 1903.[3] At the present time, street opening and improvement are carried on under general laws, as modified by section 145 of the charter.[4] The effect of this amendment is to vest the board of public works with the jurisdiction of the council in regard to the letting of contracts. Section 145 reads as follows:

[25] See Charter, art. VII, sec. 3.

[1] Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

[2] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

[3] Stats. 1903, p. 572.

[4] Stats. 1905, p. 983.

"The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred upon the city council relating to:

"1. The advertising for, and inviting proposals or bids for doing any work ordered by the city council to be done in or upon any streets, avenues, lanes, alleys, courts or places, or in the construction of any sewer or drain, ordered by the city council in or over the right of way granted or acquired for such purpose;

"2. The examining, considering, and declaring of such proposals or bids;

"3. The awarding, letting, and re-letting of contracts for doing any of the work so ordered, the giving notice of such award, the rejection of proposals or bids for doing such work, and the granting of extensions of time for the completion thereof by the contractor therefor;

"4. The approval and the fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work, and the fixing of time within which such work shall be commenced and completed.

"The board shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval of the award of contracts for any of the work mentioned in this section.

"The board of public works shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon any commission provided for by law to assess the benefits, damages and costs incident to a proposed change of grade of any public street, alley, lane, or court.

"(b) The president of the board of public works shall have and exercise all of the powers and duties that are now or hereafter may be conferred or imposed by law upon the mayor relating to the approval and fixing of the amount of bonds required to be given by contractors prior to, or at the time of, executing contracts for such work.

"(c) The secretary of the board of public works shall have and exercise all of the powers and duties that are now or hereafter may be conferred or imposed by law upon the city clerk or clerk of the city council relating to:

"1. The receipt, care and custody of proposals or bids for doing any of the work mentioned in this section.

"2. The care and custody of all checks and bonds and accompanying such proposals or bids."

In addition to the foregoing, the charter confers general power to do street work; and expressly authorizes the council, by ordinance, to provide for the planting and care of shade trees, and to make the costs thereof a charge upon the abutting property.

§ 818. **Modesto.**—The charter of Modesto confers general authority to do street work,[5] but neither prescribes a procedure nor expressly adopts the general law. No officer may be interested in any contract. Eight hours is the maximum time of labor permitted during any one day. A contract awarded to a bidder who has colluded with others is void.

§ 819. **Same—Monterey.**—The charter of Monterey confers general authority to do street work.[6] Whenever the cost of street improvement is to be paid by a special assessment, the general laws in force at the time of the improvement govern and control.[7] Whenever the cost and expense of street opening is to be paid by a special assessment the general law in force at the time controls "except that all the duties of the commissioners shall be performed by or under the direction of the commissioner of public works of the city, who shall receive no compensation therefor."[8] The city is authorized "to require every owner or lessee of

[5] See Charter, sec. 4; Stats. 1911. See charter provisions in Appendix, post.

[6] See Charter, sec. 73; Stats. 1911. See charter provisions in Appendix, post.

[7] See Charter, sec. 73, subd. 42.

[8] See Charter, sec. 73, subd. 43.

railroads in said city to keep the streets in repair between the tracks, and along and within the distance of two feet upon each side of the tracks occupied by the owner or lessee."[9] Eight hours constitute a day's work for laborers upon public work.[10] A contract awarded to a bidder who has been guilty of collusion is void.[11]

§ 820. **Same—Napa.**—The Napa charter was adopted in 1893; and hence its provisions for street work do not control over general laws. It expressly adopts the Vrooman Act as the procedure for doing street work, but provides that where the cost of constructing sewers is more than fifty cents per front foot, the excess over such fifty cents shall be paid by the city.[12] This provision cannot limit the application of other general laws. The charter provides further that street opening shall be done under the provisions of general laws.[13]

§ 821. **Same—Oakland.**—The new charter of Oakland confers general jurisdiction upon the council to order the opening and improvement of streets. As to street improvements, it provides: "Whenever, in the judgment of the council, the cost and expense of any of the foregoing improvements should be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto."[14] As to street opening, the provision is the same, "except that no commissioner, secretary or attorney shall be appointed, and that all the duties imposed on commissioners,

9 See Charter, sec. 73, subd. 50.

10 See Charter, sec. 94.

11 See Charter, sec. 96.

12 See sec. 20 of the Charter; Stats. 1893, p. 642. See, also, charter provisions in the Appendix, post.

13 See sec. 21 of the Charter; Stats. 1893, p. 642. See, also, charter provisions in the Appendix, post.

14 See Charter, sec. 49, subd. 46. See charter provisions in Appendix, post.

secretaries and attorneys under the general law shall be performed under the direction of the commissioner of streets and the city attorney of the city, neither of whom shall receive compensation therefor, provided that nothing contained in this subdivision shall be construed as affecting any pending proceeding."[15]

§ 822. **Same—Palo Alto.**—The charter of Palo Alto confers upon the city general power to do street work;[16] but it neither prescribes a procedure nor expressly adopts the general law. The board of public works is authorized to do street work where a special assessment is not necessary.[17] Whenever a special assessment is necessary, "all such proceedings shall be had and carried on by the council upon the recommendation of the board of public works."[18] The effect of this provision is somewhat doubtful. However, it is certainly the safe practice to require a preliminary resolution of recommendation by the board of public works before the council commences proceedings.

§ 823. **Same—Pasadena—In General.**—The Pasadena charter, while prescribing no procedure for general street work except for change of grade, confers wide authority upon the council. The general laws are adopted, with the provision "that the council shall have power at any time by ordinance to abandon or re-adopt the modes or systems so provided for, or relative to, or adopt or provide or change different modes or systems for, or relative to, said work or purposes, or any of them, and for the levying and collection of assessments upon property for the doing of said work or carrying out of said purposes, and for the issue of improvement bonds to represent assessments for the cost of

[15] See Charter, sec. 49, subd. 47. See charter provisions in Appendix, post.

[16] See Charter, art. II, subd. 11; see charter provisions in Appendix, post. See Stats. 1909, p. 1175.

[17] See Charter, art. V, sec. 2; Stats. 1909, p. 1175.

[18] See Charter, art. V, sec. 3; Stats. 1909, p. 1175.

doing said work or carrying out of said purposes."[19] As yet, no proceedings adopted by ordinance have been passed upon by the courts. Moreover, "upon a petition of the owners of a majority of the frontage abutting upon any street or part thereof, the council shall have power by ordinance to require, or provide, or adopt general law or laws, for the planting, maintenance or care of grass plots between the sidewalk and roadway in such street or part thereof, and to make the cost thereof a lien and charge upon the abutting property, and to make provision of enforcement of such lien by the sale of property or otherwise."[20] It is a general rule that where a petition is prescribed, it is an essential step to the validity of the proceedings. The operation of general laws is limited in one respect. "The cost of providing crosswalks and of improving all intersections of streets, including the cost of constructing sewers therein, and of space included between the center line of the street to be improved and the prolongation of the side lines of any street forming a junction with such street to be improved, to such center line, except the cost of constructing sewers therein, shall be paid out of the general or other appropriate fund of the city, and shall not be included in the special assessment for the proposed work. When a sewer is proposed to be constructed within said last mentioned space, half of the cost of said sewer shall be assessed against the property abutting against the said space extended, and one-half of said cost shall be paid out of the general or other appropriate fund of the city."[21]

§ 824. Same—Pasadena—Procedure for Change of Grade.—The proceedings for change of grade under the Pasadena charter apply only to the change of the paper grade.

[19] See Charter, art. IX, sec. 5; Stats. 1909, p. 1200. See charter provisions in Appendix, post.

[20] See Charter, art. IX, sec. 6; Stats. 1909, p. 1200. See charter provisions in Appendix, post.

[21] See Charter, art. IX, sec. 4; Stats. 1901, p. 884. See charter provisions in Appendix, post.

No provision is made for an assessment; but it is probable that an assessment may be levied under authority of general law. The first step in the procedure is the adoption of an ordinance of intention, "in which ordinance must be specified the grade that is proposed to be established."[22] This ordinance should contain the matters required in the resolution of intention under the Vrooman Act.[23] The ordinance must be published "at least ten days in a daily newspaper published and circulated within the city of Pasadena."[24] Any owner of property fronting on the street, whose property will be damaged by the change of grade, may, within ten days after the first publication, file with the city clerk a written remonstrance, setting forth in detail the damage which will result to him from the proposed change.[25] This corresponds to the claim of damage required by the change of grade provisions of the Vrooman Act.[1] If no remonstrances are filed, it would seem that the council may, after the expiration of the time allowed for remonstrances, pass an ordinance actually changing the grade.[2] If remonstrances are filed, the city must make an effort to reach an agreement with the remonstrants as to the amount of damage. If this is impossible, the amount must be determined in condemnation proceedings.[3]

§ 825. **Same—Richmond.**—The Richmond charter confers upon the city general power to do street work and to levy special assessment therefor;[4] but it neither prescribes a procedure nor expressly adopts the general laws.

22 See Charter, art. IX, sec. 2; Stats. 1901, p. 884. See charter provisions in Appendix, post.

23 See ante, sec. 69 ff.

24 See Charter, art. IX, sec. 2; Stats. 1901, p. 884.

25 See Charter, art. IX, sec. 3; Stats. 1901, p. 884. See charter provisions in Appendix, post.

1 See ante, sec. 369.

2 See Charter, art. IX, sec. 1; Stats. 1901, p. 884. See charter provisions in Appendix, post.

3 See Charter, art. IX, sec. 3; Stats. 1901, p. 884.

4 See Charter, art. II, sec. 1, subd. 11; Stats. 1909, p. 1263. See charter provisions in Appendix, post.

§ 826. **Same—Riverside.**—The Riverside charter expressly adopts the general laws relating to street work, but empowers the council to adopt ordinances establishing different procedures.[5] Section 253 provides: "The council is hereby given power to enact ordinances providing for, and having the effect as long as such ordinances shall remain in force, of repealing all, any, or any portion of any such general laws, as far as the same shall relate to the city of Riverside, and substituting in place thereof other measures, provisions and regulations, relating to similar matters; and, provided, the council is hereby given power to enact ordinances providing other and different measures, provisions and regulations relating to any, all or any portion of the matters covered in such general laws, and in any proceedings relating to any of said matters to decide and provide in the resolution or ordinance ordering or initiating said proceedings, whether said proceedings or work shall be conducted under general laws, under general laws as amended by said ordinances, or entirely under said ordinances. A repeal of any such ordinance will revive the operation of any such general law so repealed in whole or in part, with amendments thereto, provided said law be still in force in the state." A peculiar feature of this charter is that the city is authorized to submit bids. This is provided for in section 255, which reads as follows: "The council shall have power to cause an estimate to be made and a bid submitted on behalf of the city by the city engineer and the superintendent of streets on any work provided for in this article. Said bid shall be in regular form, but no bond, certified check or other deposit or security shall be required of the city. The contract for said work may be awarded to the city if the bid of said city is the lowest, or to the next highest responsible bidder at the option of the council. No bond shall be required of the city, but the contract shall be signed in regular form.

[5] See Charter, sec. 253; Stats. 1907, p. 1277. See charter provisions in Appendix, post.

The superintendent of streets shall have charge of the execution of any such contract and careful records of cost must be kept. The city may do any such work on application of a petition signed by the owners of a majority of the frontage of the property fronting on any proposed improvement, even though no bid was submitted by said city, or without said petition if the council deems that the city can do such work at less cost than the lowest bid therefor. Any such work may be done by day labor, or sublet by contract, or both. Assessments for such work shall be collected as designated by the council."

§ 827. **Same—Sacramento.**—The Sacramento charter authorizes the board of trustees to do general street work and to make the cost thereof a lien upon the property;[6] but it does not prescribe any procedure. This charter was adopted in 1893 prior to the amendment making charters govern municipal affairs.

§ 828. **Same—Salinas City.**—The Salinas City charter confers upon the council general power to do street work,[7] but neither prescribes the procedure nor expressly adopts general laws.

§ 829. **Same—San Bernardino.**—The San Bernardino charter confers upon the mayor and common council general power to do street work. No procedure is prescribed. Section 224 provides, however: "In all matters pertaining to municipal affairs, concerning which provision is not made in this charter, the general laws of the state, in force at the time, shall be in force in this city, so far as the same may be applicable to the class of cities to which this city may belong."[8]

[6] See Charter, sec. 25; Stats. 1893, p. 547. See charter provisions in Appendix, post.

[7] See Charter, sec. 19; Stats. 1903, p. 599. See charter provisions in Appendix, post.

[8] Stats. 1905, p. 940. See charter provisions in Appendix, post.

§ 830. **Same—San Diego.**—The charter of San Diego expressly adopts the procedure for street work prescribed by general laws in force at the time proceedings are taken.[9] The charter expressly provides, however, that "no compensation shall be allowed for damage to gas or water pipes, railway tracks, telegraph or telephone posts or wires, or other property or thing laid above, along, in, or under any street, highway, park, place, or other public property."[10]

§ 831. **Same—San Jose.**—For street opening, the San Jose charter expressly adopts the street opening act of 1889, and any acts amendatory thereof or supplemental thereto, now or hereafter made.[11] For street improvement, it expressly adopts the Vrooman Act, as it was when the charter was adopted and as thereafter amended, "except where the provisions of said act conflict or are inconsistent with the provisions of this charter."[12] The Bond Act is also referred to, and, by inference, is adopted.[13] In several respects, the procedure under the Vrooman Act is modified: (1) When the estimated expense exceeds two dollars per front foot along each line of the street, "the superintendent of streets, at the time of posting along the street the notices of the passage of the resolution of intention, shall cause to be deposited on the front doorstep of each dwelling fronting on the proposed improvement a copy of Part I of said act."[14] The meaning of this is not altogether clear. No estimate is required for ordinary work under the Vrooman Act. This provision would seem to require an estimate before the time for posting. (2) At the beginning of each month,

[9] As to street improvement, see Charter, art. V, c. 2; as to street opening, see Charter, art. V, c. 4; Stats. 1901, p. 881. See charter provisions in Appendix, post.

[10] See Charter, art. II, sec. 2, subd. 44; Stats. 1889, p. 643. See charter provisions in Appendix, post.

[11] See Charter, art. VIII, c. 2, sec. 1; Stats. 1897, p. 592. See charter provisions in Appendix, post.

[12] See Charter, art. VIII, c. 1, sec. 1; Stats. 1897, p. 592. See charter provisions in Appendix, post.

[13] See Charter, art. VIII, c. 1, sec. 4.

[14] See Charter, art. VIII, c. 1, sec. 2.

the superintendent of streets must file with the city clerk a verified statement of incidental expenses.[15] (3) Bids must be on printed forms, to be furnished gratuitously by the superintendent of streets. "Each bid shall have thereon the affidavit of the bidder that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived, or agreed, directly or indirectly, with any other bidder or person, to put in a sham bid, or that any other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against said city, or any person interested in said improvement, for himself or any other person. No person, corporation, or firm shall be allowed to make or file or be interested in more than one bid for the same work. If, on the opening of said bids, more than one bid appear in which the same person, corporation, or firm is interested, all such bids shall be rejected."[16] The purpose of these requirements is to protect the city and the parties liable to assessment from collusive bids. Hence, it would seem clear that a failure to file such an affidavit with a bid would be fatal to the validity of any contract entered into upon such a bid. This differs from the general requirement that a certified check or bond accompany the bid, for the only purpose of such a requirement is to insure the entering into of a contract; and a failure to give such check or bond works no injury after the contract is actually signed. (4) The requirements for sureties are more stringent than those of the general law. Each surety must make affidavit "that he is worth the amount for which he becomes surety over and above all his debts and liabilities in unencumbered real property, situated in this state, standing of record in his own name and assessed to him, and on which the taxes are not delinquent. Said bond shall be approved by the mayor. If such surety be a nonresident of the county of Santa Clara, his sufficiency shall be certified by

[15] See Charter, art. VIII, c. 1, sec. 5.
[16] See Charter, art. VIII, c. 1, sec. 6.

the superior judge of the county where he justifies, whose certificate shall be indorsed on said bond before the same is presented to the mayor for approval."[17] A surety bond, however, may be taken, if approved by the mayor and common council. (5) "When the work under any contract shall have been completed, the contractor shall make out and file in the office of the superintendent of streets an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with anyone on his behalf, to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price, and no assessment shall be made until said affidavit is filed. Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work, other than the property owners who were parties to the agreement, and shall operate to void, as to such persons so defrauded, any assessment made for the work done under said contract."[18] The effect of such an agreement under the general law has been discussed in an earlier chapter.[19] This provision makes not only the filing of an affidavit, but the actual facts in such affidavit stated, essential to a right to recover. Hence, it would seem clear that an owner may set up the fact of such an agreement, although an affidavit denying its existence is on file. (6) If the work is done under the repair clause of the Vrooman Act, section 13, the superintendent of streets must, with the notice requiring the repair or reconstruction to be made, deposit a copy of sections 13, 14, 15, 16, and 17 of the act, and also a copy of any ordinance passed pursuant to section 15 of the act, on the front doorstep of each dwelling fronting on the proposed improvement.[20] (7) When bonds are to be issued, "and any assessment less in amount than $50 remains unpaid for thirty days from the date of the warrant, or for five days

17 See Charter, art. VIII, c. 1, sec. 7.
18 See Charter, art. VIII, c. 1, sec. 8.
19 See ante, sec. 176.
20 See Charter, art. VIII, c. 1, sec. 3.

after final decision on appeal, as provided in section 11 of said act, the mayor and common council may, by resolution, order such assessment paid from the street contingent fund, and the superintendent of streets shall thereupon release said assessment on the books of his office as upon payment in other cases."[21]

§ 832. **San Luis Obispo.**—The charter of San Luis Obispo confers upon the council general authority to order street work and to compel owners to remove weeds from sidewalks.[22] Whenever a special assessment is to be levied, the work is to be done under the provisions of general laws in force at the time; provided, however, that at least one-fourth of the expense "shall be paid by the said city, out of such fund as the council may designate, and no special assessment as aforesaid for any of such work shall be made on private property nor become a lien on the same in amount greater than three-fourths of the total cost and expense of such work or improvement; and the council shall, before any assessment for such work is made up, designate by resolution the proportion of the total cost and expense of the same to be paid by the municipality, which shall not be less than one-fourth thereof, and in making up such assessment there shall be deducted from the whole cost and expense such part thereof as has been so ordered to be paid out of the municipal treasury, and the remainder of said cost and expenses shall be assessed proportionately upon the lots, parts of lots and lands liable to be assessed therefor in accordance with the general laws of the said state of California."[23] For the opening of streets, the general laws of the state prevail, "except that all the duties of the commissioners and secretaries shall be performed by or under the direction of the commissioner of public works of the city,

[21] See Charter, art. VIII, c. 1, sec. 4.

[22] See sec. 45 of the Charter, Stats. 1911. See charter provisions in Appendix, post.

[23] See Charter, sec. 45, subd. 41.

who shall receive no compensation therefor."[24] No officer of the city shall be interested in any contract.[25] A contract awarded to a bidder who has been guilty of collusion is void.[1] The city may compel railroads to keep in repair the portion of the streets between their tracks and along and within the distance of two feet upon each side thereof.[2]

§ 833. **Same—Santa Barbara.**—The charter of Santa Barbara confers upon the council general power to do street work;[3] but no complete procedure is prescribed, nor are general laws expressly adopted. In 1909, however, the charter was amended by giving the board of public works jurisdiction over the letting of contracts;[4] and the amendment assumes the operation of general laws. The powers of the board of public works and its officers are practically identical with those conferred by the Los Angeles charter, which have already been considered, and need not be repeated.[5] It is probable that the provisions of the Vrooman Act as to repair of streets are inapplicable. Section 163 of the charter provides that all public streets "shall be kept in repair, so that the same shall be in good passable condition; and it shall be the duty of the street superintendent to keep all said streets, lanes, alleys, places and courts within the city limits in good repair, at the expense of the city."[6]

§ 834. **Same—Santa Cruz.**—The charter of Santa Cruz confers general power upon the city to do street work,[7] and

[24] See Charter, sec. 45, subd. 42.

[25] See Charter, sec. 32.

[1] See Charter, sec. 65.

[2] See Charter, sec. 45, subd. 47.

[3] See Charter, sec. 43, subds. 1, 4, 6; Stats. 1905, p. 933. See charter provisions in Appendix, post.

[4] See Charter, sec. 124; Stats. 1909, p. 1154. See charter provisions in Appendix, post.

[5] See ante, sec. 817.

[6] See Charter, sec. 163; Stats. 1899, p. 485. See charter provisions in Appendix, post.

[7] See Charter, art. II; Stats. 1907, p. 1105. See charter provisions in Appendix, post.

expressly adopts the general laws for the procedure.[8] A change of grade must be accomplished by ordinance.[9] "The cost of providing cross-walks, and of improving all intersections of streets, including the cost of constructing sewers therein, and of the space included between the center line of the street to be improved and the prolongation of the sidelines of any street forming a junction with such street to be improved, to such center line, except the cost of constructing sewers therein, shall be paid out of the general or other appropriate fund of the city, and shall not be included in the special assessment for the proposed work. When a sewer is to be constructed in the last-mentioned space, one-half of the cost of said sewer shall be assessed against the property abutting against said space extended, and one-half of said cost shall be paid out of the general or other appropriate fund of the city."[10]

§ 835. **Same—Santa Monica.**—The charter of Santa Monica confers general power upon the city to do street work, and to levy special assessments therefor.[11] Nothing is said as to procedure. There is a general provision, however, to the effect that all acts of the legislature relating to the city of Santa Monica shall remain in force until repealed by the proper authority.[12]

§ 836. **Same—Stockton.**—The Stockton charter confers general authority to do street work,[13] but prescribes no procedure. As originally adopted in 1889, the charter contained the Vrooman Act in full in sections 165 to 200, inclusive. These provisions, however, were repealed in 1905.[14]

8 See Charter, art. XVIII, sec. 3; Stats. 1907, p. 1105.

9 See Charter, art. XVIII, sec. 1.

10 See Charter, art. XVIII, sec. 2.

11 See Charter, art. II, sec. 1, subds. 8, 11; Stats. 1907, p. 1007. See charter provisions in Appendix, post.

12 See Charter, art. XVI, sec. 5; Stats. 1907, p. 1007.

13 See Charter, sec. 30, subds. 1, 4½, 5; Stats. 1905, p. 859. See charter provisions in Appendix, post.

14 Stats. 1905, p. 852.

§ 837. **Same—Watsonville.**—For street improvement, the Watsonville charter expressly adopts the Vrooman Act "as since amended and as herein amended," and provides that it "shall have the same force and effect as if incorporated at length herein except where the provisions of said act conflict or are inconsistent with the provisions of this charter; and no repeal of said act shall affect its applicability to the city of Watsonville."[15] The only express limitation is as to the effect of protests. The board of aldermen are authorized to provide for street improvements "whether a majority of the property owners whose property fronts on such street, alley or lane, desire said improvement or not; but no street, alley or lane may be so improved against the will of said property owners or the owners of a majority of the property fronting on said street, alley or lane where the cost of such improvement shall exceed one dollar per front foot for each side of said street, alley or lane."[16] For street opening, the charter expressly adopts the Street Opening Act of 1889, "and any acts amendatory thereof or supplemental thereto," and provides that they shall "have the same force and effect as if incorporated at length herein, except where the provisions of said act or acts conflict or are inconsistent with the provisions of this charter, and no repeal of such act shall affect its applicability to the city of Watsonville."[17]

[15] See Charter, art. XI, sec. 1; Stats. 1903, p. 648. See charter provisions in Appendix, post.

[16] See Charter, art. XI, sec. 2; Stats. 1903, p. 648. See charter provisions in Appendix, post.

[17] See Charter, art. XI, sec. 3; Stats. 1903, p. 648. See charter provisions in Appendix, post.

CHAPTER II.

SAN FRANCISCO CHARTER.

DIVISION 1.

STREET IMPROVEMENT.

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§ 838. **Scope of the Charter Provisions.**—The San Francisco charter contains a complete procedure for street improvement, based upon the Vrooman Act; for change of grade, based upon the Vrooman Act; and for street opening, based upon the Street Opening Act of 1889. In addition, a recent amendment has authorized the construction of subways and tunnels under a special assessment procedure. The city is not liable for damages which may result from defective streets; nor is the board of public works liable, except for neglect to repair an accepted street, or for neglect to repair a sewer.[1] The procedure prescribed has been amended on several occasions.

§ 839. **Charter Provisions not Exclusive.**—Until recently, the provisions of the San Francisco charter have been exclusive. In 1910, however, the charter was amended by adding section 33 to chapter 2 of article VI. This new provision authorizes the city, under certain conditions, to proceed in the improvement of streets, under the general law, or to establish another procedure by ordinance. The new section provides: "The method of procedure in this article provided for the improvement of streets, or for the construction of tunnels, subways, or viaducts and appurtenances thereto, and for the assessment of the expense thereof or any portion of such expense upon private property shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor

[1] See Charter, art. I, sec. 5.

any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the said board may by a like affirmative vote of the members thereof adopt an ordinance which may from time to time be revised and amended, providing a method of procedure for such improvement and assessment; and in such ordinance if said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments not to exceed ten years upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent per annum."

§ 840. **What are Public Streets.**—The provisions of the San Francisco charter prescribing a procedure for street improvement follow, in a general way, the Vrooman Act. Hence many of the decisions interpreting the Vrooman Act are applicable to the charter provisions. In discussing the charter, I shall not repeat in detail matters which have already been treated in a former chapter. The first section of chapter 2 of article VI is practically identical with section 1 of the Vrooman Act. It defines what are open public streets.[2] It provides: "All streets, lanes, alleys, places or courts, in the city and county now open or dedicated or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purposes of this chapter; and the supervisors are hereby empowered to fix the width and grade thereof, and to order to be done therein and thereon any and all street work and street improvement under the proceedings hereinafter described."

[2] For a discussion of section 1 of the Vrooman Act, see ante, secs. 52–54.

§ 841. **Application to the Board of Public Works.**—The first step in the proceedings is the filing of an application for the doing of the work with the board of public works.[3] This may be made (1) by an owner or owners of property liable to be assessed for the same, or by their agents; (2) by the board of health for sanitary reasons; or (3) by the board of supervisors, expressed by resolution. It is to be noted that a petition of one property owner liable to assessment is sufficient to initiate the proceedings. Under other statutes requiring a petition as a prerequisite to the commencement of proceedings, it is held that no jurisdiction can be acquired in its absence.[4] The application must be in writing, and, of course, must be signed. However, it "need but in general describe or refer to the work or improvement applied for." In determining the sufficiency of any application, it must be borne in mind that the city is not bound in any way to order the exact improvement applied for. Its purpose is not to give notice. Hence it would seem that any application which specifies the portion of the street to be improved and in general terms specifies the nature of the improvement desired is sufficient. One exception to the requirement of an application is where the expense is to be paid by the city and county. In such a case, the board of public works "must make, with said recommendation to the supervisors, an estimate of the expense." Another is stated in section 4, which provides: "In all cases of work or improvement in this section hereinbefore provided, where the board of public works is vested with power to continue proceedings in relation to any proposed work or improvement, notwithstanding any objections of property owners to the doing of the same, the board may determine that such work or improvement is expedient, or that the public interest or convenience requires the doing of the same, and it may institute proceedings therefor and

[3] See Charter, art. VI, c. 2, sec. 2.

[4] Gately v. Leviston, 63 Cal. 365; Dyer v. North, 44 Cal. 157; Dyer v. Miller, 58 Cal. 585; Spaulding v. North San Francisco etc. R. R. Assn., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249.

the provisions of section 2 of this chapter, requiring a written application to the board in the first instance, to be made therefor, shall not be applicable thereto."

§ 842. Action upon the Application.—Section 2 provides: "No street work or street improvements of any kind shall be ordered to be done by the supervisors unless a written recommendation to do the same has been made to them by the board of public works, except in the case hereinbefore provided, and all such recommendations shall be made matters of records in the office of said board." The exception is in cases where the expense is paid by the city and county. In such case, if the board of public works reports adversely, the board of supervisors, by an ordinance passed by the affirmative vote of not less than fourteen members, may order the work. It is necessary that the board of public works take action, therefore, in order that the subsequent proceedings may be valid. "If the expense thereof or any portion of such expense is to be assessed upon private property, the board of public works shall investigate the same, and may modify, amend, alter, or increase the same, as it may deem proper." This leaves the extent of the work almost entirely to the board of public works. It would seem, however, that the work recommended should bear such relation to the work petitioned for that it amounts, in substance, to the same improvement. For instance, a petition for work on one street would certainly not authorize the recommendation of separate and distinct work on another street. In cases where the work is to be paid for, in whole or in part, by a special assessment, the board of public works must first pass a resolution of intention.

§ 843. Resolution of Intention.—Section 3 provides: "Before recommending to the supervisors the ordering of any work or improvement, the expense of which, or any part thereof, is to be assessed upon private property, the board of public works shall pass a resolution of its intention to recommend the same, specifying the work to be

recommended, and shall fix a day when it shall take final action upon said resolution." This resolution in its essential features is similar to the resolution of intention required by section 3 of the Vrooman Act; and what has been said as to the contents of that resolution applies here.[5] Technically, the two resolutions differ in that the resolution under the charter expresses an intention to recommend the work while the resolution under the general law expresses an intention to order the work. The resolution should designate the newspaper in which it is to be published. As we have seen in the discussion of the Vrooman Act, the designation may be made by separate resolution;[6] but it is the better practice to incorporate it in the resolution itself. The same section provides that the secretary of the board shall, without further authority, cause a copy of the resolution to be posted and published. This may be construed to render a direction to post and publish the resolution unnecessary. The requirement that the board "shall fix a day when it shall take final action upon said resolution" would seem to be satisfied by a statement of such time in the resolution of intention. In fact, it would seem to be necessary so to include it, for otherwise no notice of the time of hearing would be given.

§ 844. **Same—Crossings of Streets not Intersecting at Right Angles.**—Section 2 provides: "When the board shall recommend any work to be done on a street intersection or crossing, where the streets do not intersect each other at right angles, it shall in each such case determine what lots in the blocks adjacent to such intersection or crossing will be benefited by said work, and shall cause a map to be made on which shall be delineated the lots so to be benefited. Such map shall be transmitted to the supervisors with said recommendation." There is no express requirement that the description of the property benefited shall be contained in the resolution of intention. However, it is the safer prac-

[5] See ante, sec. 69 ff.

[6] See ante, sec. 90.

tice to include it. The purpose of the resolution of intention is to give notice to parties interested. A designation of the property to be assessed is necessary to give this notice, except in cases where the statute so fixes such a method of assessment that the property liable can be determined without it.

§ 845. **Same—Work Done Under District Plan.**—Section 5 provides for work under the district plan, and corresponds in general to the latter part of section 3 of the Vrooman Act. What has already been said as to the resolution of intention for work done under the district plan under that act is applicable here.[7] Section 5 provides: "When the contemplated work or improvement in the opinion of the board of public works is of more than local or ordinary public benefit, it may recommend to the supervisors that the expense of such work or improvement be made chargeable upon a district, and said board shall in its resolution of intention set out the district benefited by said work or improvement and to be assessed to pay the expense thereof."

§ 846. **Posting, Publication, and Mailing of Resolution.** Section 3 provides: "Upon the passage thereof the secretary of the board shall forthwith, without any further authority, cause a copy of said resolution to be posted conspicuously for five days in the office of said secretary, and to be published for a period of ten days (legal holidays excepted) and cause a copy to be deposited in the postoffice at the city and county, with postage prepaid, addressed to each person represented on the assessment-book of the city and county for the next preceding fiscal year as being owner of land liable to be assessed for said improvement; but if said lot stand on said book in the name of unknown owners, such notice need not be sent." This corresponds in a general way with the requirement of section 3 of the Vrooman Act;[8] but the time of posting and publication under the

[7] See ante, secs. 86–88.

[8] See ante, secs. 89–91.

charter is longer, and the requirement of mailing is additional. The resolution should be published in the newspaper designated by the board of public works. It is probable that if it is published without a designation, or in a newspaper other than that designated, no jurisdiction is acquired.[9] The giving of notice in the manner prescribed is jurisdictional.[10]

§ 847. **Posting of Notices of the Passage of the Resolution.**—Section 3 further provides: "The board shall also cause to be conspicuously posted along the line of said contemplated improvement, at points not more than one hundred feet in distance apart, notices, not less than three in all, of the passage of said resolution. Each of said notices shall be headed 'Notice of Street Work' in letters not less than two inches in length, and shall in legible characters state the fact of the passage of said resolution, its date, and briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars." This corresponds in general with the street superintendent's notice under the Vrooman Act; but it differs in that this notice is not required to be posted by the street superintendent, and in that no publication is required. The contents and the manner of posting are practically the same as under the Vrooman Act.[11] The words "along the line of said contemplated improvement" mean longitudinally along the line of the street to be improved.[12]

§ 848. **Effect of a Majority Protest.**—The charter differs in several respects from the Vrooman Act in its provisions as to the effect of a majority protest. Section 4 provides: "The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block, or more, and, in case of a dis-

[9] See ante, sec. 90.
[10] See ante, secs. 89–91.
[11] See ante, secs. 92–97.
[12] See ante, sec. 95.

trict, those owning more than one-half of the superficial area of the district, exclusive of street surface, may make written objections to the same within ten days after the expiration of the time of the publication of said resolution of intention, which objections shall be delivered to the secretary of the board of public works, who shall indorse thereon the date of their reception by him. Such objections shall delay for six months any further proceedings in relation to the doing of said work or making said improvement, under the said resolution of intention, unless the owners of the one-half or more of the frontage or of the district, as aforesaid, shall meanwhile petition for the same to be done, and thereupon the proceedings shall be continued under the said resolution of intention, if said board shall deem proper.

"If, however, the owners of at least two-thirds of the property fronting on said proposed work or improvement, and, in case of a district, those owning at least two-thirds of the superficial area of the district, exclusive of street surface, shall make written objections to the said proposed work or improvement, after the expiration of the time hereinbefore fixed for making the objections in the first instance to the same (and which objections delayed for six months any further proceedings in relation to the doing of said work or making said improvement under said resolution of intention) and before the expiration of the said six months, no further proceedings shall be taken under the said resolution of intention. But if no such objections have been made, then the board of public works, after the expiration of said six months, shall, if it deem proper, continue the proceedings under the resolution of intention aforesaid, notwithstanding the objections first made, as hereinbefore provided, or any further objections to the doing of said work or making said improvement."

Under the Vrooman Act, a majority protest, when a bar, puts an end to the proceedings; and the work can be done thereafter only upon the commencement of new proceedings. The effect of the charter provision, on the other hand, is

merely to suspend the operation of the proceedings during the time of the bar. Proceedings are absolutely barred only in case of a two-thirds protest filed after the bar has taken effect. What has been said as to the form of protests and as to the necessity for filing in time, under the Vrooman Act, is applicable here.[13] It is to be noted, also, that under the charter, special provision is made for a majority protest against work done under the district plan.

§ 849. **Same—Exceptions.**—The exceptions to the general operation of the majority protest are practically the same as under the Vrooman Act, and the discussion need not be repeated here.[14] Section 4 provides:

"But when the work or improvement proposed to be done is the construction of sewers, manholes, culverts, drains, cesspools, catch-basins or storm-water inlets, or of sidewalks, or of curbs, or any work or improvement on a street crossing, or on a street intersection, and written objections thereto have been delivered to the secretary of the board of public works within the time hereinbefore provided, by the owners of a majority of the frontage or of the district aforesaid, and in case of work or improvement on a street crossing or a street intersection, by the owners of a majority of the street frontage liable to be assessed therefor, the board shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The secretary of the board shall thereupon notify the persons making such objections by depositing a notice thereof in the post-office at the city and county, postage prepaid, and addressed to each objector or his agent when he appears for such objector. At the time specified the board shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive; and if said objections are overruled the proceedings shall be continued as though no objections had been made.

[13] See ante, sec. 99 ff.

[14] See ante, sec. 106 ff.

"And when not more than two blocks on a street, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon such street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, proceedings for the doing of any work or improvement, upon said intervening ungraded or unimproved part of said street, or at the end of a street, shall not be stayed or prevented by any written or other objections, unless the board shall deem proper.

"And if one-half or more in width or in length, or as to grading, one-half or more of the grading work, of any street lying and being between two successive main street crossings, or if a crossing has been already partially graded or improved, as aforesaid, the board may proceed as in this chapter provided, to have the remainder improved, graded, or otherwise, notwithstanding any objections of property owners."

§ 850. **Petition of Remonstrance.**—In providing for a petition of remonstrance, the charter again follows the Vrooman Act. The provision is substantially the same as the corresponding provision of the Vrooman Act, which has been already discussed.[15] Section 4 provides: "At any time before the making of the assessment as hereinafter provided, all owners of lots of land liable to assessment therein, who, after the first publication of the aforesaid resolution of intention, may feel aggrieved, or who may have objections to any proceedings in relation to the performance of the work described in said resolution, may file with the secretary a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object. Such petition of remonstrance shall be passed upon by the board, and its decision thereon shall be final and conclusive." As under the Vrooman Act, the

[15] See ante, sec. 112.

decision of the board is conclusive only as to matters which the board has jurisdiction to determine. It does not cure jurisdictional defects.[16]

§ 851. **Objections to Extent of District.**—As in the Vrooman Act, the charter provides for a protest or objection to the extent of the district when the work is done under the district plan. Section 5 provides: "Objections to the extent and boundaries of the district of lands to be benefited by said work or improvement may be made by any interested party, in writing, within ten days after the expiration of the time of publication of the resolution of intention. The secretary of the board shall lay said objections before it and the board shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The secretary shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice at the city and county, postage prepaid, addressed to each objector. At the time specified the board shall hear the objections urged and pass upon the same, and if said objections are overruled, its decision shall be final and conclusive as to the extent and boundaries of the district. If the objections are sustained, the board shall proceed to set out another district to the extent and boundaries of which objections may be made and a hearing had thereon as above provided; and so on in like manner until a district has been set out to the extent and boundaries of which all objections shall be overruled by the board—its decision in that behalf to be final and conclusive; and thereupon the proceedings shall continue the same as if no objections had been made." This provision is more complete than the corresponding provision of the Vrooman Act.[17] Under the charter, the board's decision goes only to the justice of the district fixed. It cannot amend the district set out without giving a new notice.

16 See ante, secs. 251–263.

17 See ante, sec. 113.

§ 852. **Recommendation to Supervisors.**—Upon acquiring jurisdiction, the board of public works must make a report to the supervisors recommending the improvement. This recommendation may be made in the form of a resolution. When the work includes crossings of streets which do not intersect at right angles, the board of public works must determine what property will be benefited thereby, and accompany its recommendation with a map of such district.[18] When the work is to be done under the district plan, the boundaries of the district should be set forth. "In its report to the supervisors the board shall accompany its report with a diagram on which shall be delineated each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work or improvement proposed to be done within the limits of the district. Such diagram shall be certified to be correct by the secretary of the board."[19]

§ 853. **Resolution or Ordinance Ordering Work.**—Upon receiving the recommendation, the board of supervisors may pass a resolution ordering the work. This resolution is governed by practically the same rules which apply to the corresponding resolution under the Vrooman Act.[20] "When the construction of any sewer or drain shall involve a cost of more than five dollars per lineal foot for any block, it shall not be authorized except by an ordinance passed by the affirmative vote of not less than fourteen members of the board of supervisors."[21]

§ 854. **Specifications.**—There is no express provision as to how specifications shall be adopted, nor by which board. A former city attorney of San Francisco advised that it would be proper to follow the procedure prescribed by the

18 See Charter, art. VI, c. 2, sec. 2.
19 See Charter, art. VI, c. 2, sec. 2.
20 See ante, secs. 129–133.
21 See Charter, art. VI, c. 2, sec. 2.

Vrooman Act, and suggested that specifications be adopted by both boards.[22]

§ 855. **Use of Patented Materials.**—Section 26 provides: "No patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city and county all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon its streets under any contract that may be awarded to him, or entered into by him with the city and county."[23]

§ 856. **Notice Calling for Bids.**—The award of contracts is governed by chapter 1 of article VI. The procedure differs in some respects from that of the Vrooman Act. Section 14 provides: "Before the award of any contract for doing any work authorized by this article, the board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvement, not exceeding an estimated cost of five hundred dollars, shall be deemed of urgent necessity by the board, such repairs or improvement may be made by the board under written contract or otherwise, without advertising for sealed proposals." And section 15 provides: "Said advertisement and notice shall invite sealed proposals to be delivered at a certain day and hour at the office of the board for furnishing the materials for the proposed work, or for doing said work, or for both, as may be deemed best by the board, and shall contain a general description of the work to be done, the materials to be furnished, the time within which the work is to be commenced, and when to be completed, and the amount of bond to be given for the faithful performance of the contract, and shall refer to plans and specifications on file in the office of the board for full details

[22] Opinions of City Attorney Lane (1899–1902), p. 342.

[23] As to the use of patented materials in general, see ante, sec. 128.

and description of said work and materials." The board of public works must direct the publication and posting. In its resolution so directing, it should fix the time when proposals will be received, the time for commencement and completion, and the amount of the bond. None of these matters need be stated in the advertisement for bids under the Vrooman Act.[24] Under the Vrooman Act, there is no limitation as to the time when bids may be received. The posted and published notices under the charter are the same; under the Vrooman Act they differ. Under the Vrooman Act, specifications are to be posted; under the charter, this is unnecessary.

§ 857. **Form of Bids.**—Section 16 provides:

"All proposals shall be made upon printed forms to be prepared by the board, and furnished gratuitously upon application, with a form for the affidavit hereinafter provided for printed thereon. Each bid shall have thereon the affidavit of the bidder that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the city and county, or any person interested in said improvement, for himself or any other person. All bids shall be clearly and distinctly written, without any erasure or interlineation, and if any bid shall have an erasure or interlineation, it shall not be received or considered by the board. Any contract made in violation of any of the foregoing provisions, and in the case of improvement of streets, any assessment for the work done under such contract, shall be absolutely void.

"All proposals offered shall be accompanied by a check, certified by a responsible bank, payable to the order of the

[24] As to the notice calling for bids under the Vrooman Act, see ante, sec. 134 ff.

clerk of the supervisors, for an amount not less than ten per centum of the aggregate of the proposal, and no proposal shall be considered unless accompanied by such check.

"No person, corporation or firm shall be allowed to make, file, or be interested in, more than one bid for the same work. If on the opening of said bids more than one bid appear in which the same person, corporation or firm is interested, all such bids shall be rejected."

These provisions are much more stringent than the requirements of the Vrooman Act.[25] The requirement of an affidavit is positive. Without it, no valid contract can be made.[1] Where two parties unite in a bid, both must make affidavits. "The purpose of the provision is to prevent collusion and fraud, and to sift the conscience of the bidder, or of all the bidders if there be more than one; but an affidavit of one of several bidders might be made in good faith notwithstanding a collusion on the part of one or more of his associates."[2] Bids should be in such form that they constitute a binding offer.[3]

§ 858. **Award of Contract.**—Section 17 of chapter 1 provides:

"On the day and hour specified in said notice inviting sealed proposals the board shall assemble and remain in session for at least one hour, and all bids shall be delivered to the board while it is so in session, and within the hour named in the advertisement. No bid not so delivered to the board shall be considered. Each bid as it shall be received shall be numbered and marked 'Filed' by the president and authenticated by his signature. At the expiration of the hour stated in the advertisement within which the bids will be received, the board shall, in open session, open, examine and publicly declare the same, and an abstract of each bid shall be recorded in the minutes of the board by

[25] See ante, sec. 137.

[1] Flinn v. Strauss, 4 Cal. App. 245, 87 Pac. 414.

[2] Flinn v. Strauss, 4 Cal. App. 245, 87 Pac. 414.

[3] See ante, sec. 137.

the secretary. Before adjourning, the board shall compare the bids with the record made by the secretary, and shall thereupon, at said time, or at such other time, not exceeding twenty days thereafter, as the board may adjourn to, award the contract to the lowest bidder, except as otherwise herein provided. Notice of such award shall forthwith be posted for five days by the secretary of the board in some conspicuous place in the office of the board, and be published for the same period of time.

"The board may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the city and county, and all bids other than the lowest regular bid; and on accepting said lowest bids, shall thereupon return to the proper parties the checks corresponding to the bids so rejected. If all the bids are rejected, the board shall return all the checks to the proper parties and again invite sealed proposals as in the first instance.

"The check accompanying the accepted bid shall be held by the secretary of the board until the contract for doing said work, as hereinafter provided, has been entered into, whereupon said certified check shall be returned to said bidder.

"If said bidder fails or refuses to enter into the contract to do said work, as hereinafter provided, then the certified check accompanying his bid, and the amount therein mentioned, shall be forfeited to the city and county, and shall be collected and paid into the general fund. Neither the board of public works nor the supervisors shall have power to relieve from or remit such forfeiture."

This procedure is quite different from that prescribed by the Vrooman Act.[4] It is to be noted that the board must accept the lowest regular bid, except where it rejects all bids or finds that the contractor has been delinquent in former contracts. It would seem that the board has not the same wide discretion that is conferred upon the council by

[4] For the procedure under the Vrooman Act, see ante, sec. 141 ff.

the Vrooman Act, which authorizes the rejection of all bids save that of the lowest responsible bidder. It would seem necessary to follow the procedure here prescribed in order to make a valid award. Under the Vrooman Act, with a requirement that bids shall be publicly declared, it is held that a failure so to declare them makes an award void.[5]

§ 859. **Penalty for Collusion.**—Section 18 of chapter 1 provides: "If at any time it shall be found that the person to whom a contract has been awarded has, in presenting any bid or bids, colluded with any other party or parties, for the purpose of preventing any other bid being made, then the contract so awarded shall be null and void, and the board shall advertise for a new contract for said work." The effect of this is to make not only an affidavit essential, but also the facts stated therein. It would seem that an owner may set up the facts for the purpose of defeating an action to enforce an assessment.

§ 860. **Property Owner's Contract.**—In providing for a property owner's contract, the charter follows the Vrooman Act.[6] Section 19 of chapter 1 provides: "In the case of improvement of streets, the owners of the major part of the frontage of lots and lands upon the street whereon the work is to be done, or which are liable to be assessed for said work, or, in the case of an assessment district, the owners of a major part of the superficial area embraced in such district or their agents, shall not be required to present sealed proposals, but may, upon making oath that they are such owners, or the agents of such owners, within ten days after the first posting of notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should such owners not enter into a written contract therefor within said ten days, or should they enter into such contract and fail to commence the work within the

[5] See ante, sec. 139.
[6] See ante, secs. 147, 148.

time stated therein, which time shall not be less than nor more than twenty days from the time of the execution of such contract, the board shall enter into a contract with the original bidder to whom the contract was awarded at the price specified in his bid. If the original bidder shall fail or refuse for fifteen days after the first posting of notice of the award to enter into the contract, the board shall again advertise for proposals as in the first instance." The main distinction between this and the corresponding provision of the Vrooman Act is that this expressly extends the right to owners of property in cases where the work is done under the district plan.

§ 861. **The Formal Contract—Extensions.**—The requirements for the execution of the formal contract differ quite materially from the corresponding provisions of the Vrooman Act.[7] The only bond required is one to secure the performance of the work. Provisions for extensions are more detailed than the corresponding provisions of the Vrooman Act; but in general the rules in regard thereto are the same. Section 21 of chapter 1 provides: "All contracts shall be drawn under the supervision of the city attorney, and shall contain detailed specifications of the work to be done, the manner in which it shall be executed, and the quality of the material to be used. Every contract entered into by the board shall be signed by all the members thereof and by the other contracting party. All contracts shall be signed in triplicate, one of which, with the specifications and drawings, if any, of the work to be done, and the materials to be furnished, shall be filed with the clerk of the supervisors; one thereof, with said specifications and drawings, shall be kept in the office of the board, and the other with said specifications and drawings shall be delivered to the contractor. At the same time with the execution of the contract the contractor shall execute to the city and county and deliver to the secretary of the board a bond in the sum

[7] As to the contract under the Vrooman Act, see ante, sec. 156 ff.

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[5] See ante, sec. 139.
[6] See ante, secs. 147, 148.

time stated therein, which time shall not be less than nor more than twenty days from the time of the execution of such contract, the board shall enter into a contract with the original bidder to whom the contract was awarded at the price specified in his bid. If the original bidder shall fail or refuse for fifteen days after the first posting of notice of the award to enter into the contract, the board shall again advertise for proposals as in the first instance." The main distinction between this and the corresponding provision of the Vrooman Act is that this expressly extends the right to owners of property in cases where the work is done under the district plan.

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[7] As to the contract under the Vrooman Act, see ante, sec. 156 ff.

named in the notice for proposals, with two or more sufficient sureties to be approved by the board, or shall deposit with the secretary a certified check upon some solvent bank for said amount, for the faithful performance of the contract. No surety on any bond, other than lawfully authorized surety companies, shall be taken unless he shall be a payer of taxes on real property, not exempt from execution or subject to homestead claim, the assessed value of which, over and above all encumbrances, is equal in amount to his liabilities on all bonds on which he may be surety to the city and county; and each surety shall justify and make an affidavit (for which a form shall be printed upon said bond), signed by him, that he is assessed upon the last assessment-book of the city and county in his own name for real property in an amount greater than his liability on all bonds on which he is surety to the city and county, and that the taxes on such property so assessed are not delinquent. The contract shall specify the time within which the work shall be commenced and when to be completed, as was specified in the notice inviting proposals therefor. Upon the recommendation of the board, the supervisors may extend said time; but in no event shall the time for the performance of said contract be extended by the supervisors more than ninety days beyond the time originally fixed for its completion; but, on the unanimous recommendation of the board of public works, a further extension may be granted by vote of fourteen members of the board of supervisors. In case of failure on the part of the contractor to complete his contract within the time fixed in the contract, or within such extension of said time as is herein provided, his contract shall be void, and the supervisors shall not thereafter pay or allow him any compensation for any work done by him under said contract; and, in case of the improvement of streets, where the work is to be paid for by assessment levied upon real property, no assessment shall be made for the work done under said contract. Any contract may provide for progressive payments if in the ordinance author-

izing or ordering the work permission is given for such a contract. But no progressive payments can be provided for or made at any time which, with prior payments, if there have been such, shall exceed in amount at that time seventy-five per cent of the value of the labor done and materials furnished and used up to that time, and no contract shall provide for or authorize or permit the payment of more than seventy-five per cent of the contract price before the completion and acceptance by the proper officer or board of the work done under said contract."

§ 862. **Additional Requirements of Contract.**—Section 22 of chapter 1 provides: "The work in this article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this article must contain a provision to that effect, and also, that in no case, except where it is otherwise provided in this charter, will the city and county, or any department or officer thereof, be liable for any portion of the expense, or in the case of improvement of streets, for any delinquency of persons or property assessed."[8] Under the Vrooman Act, the work must be done under the direction and to the satisfaction of the superintendent of streets.[9]

§ 863. **Affidavit of Contractor upon Completion.**—Section 6 of chapter 2 provides: "When the work under any contract shall have been completed, the contractor shall make and file in the office of the board of public works an affidavit to the effect that he has not entered into any agreement, verbal or written, with any person liable to be assessed for said work, or with anyone on his behalf, to accept a price from him less than the price named in said contract, or to make any rebate or deduction to him from such price.

[8] For a discussion of the similar provision of the Vrooman Act, see ante, secs. 160, 161.

[9] See ante, sec. 160.

Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work other than the property owners who were parties to the agreement, and shall make void, as to such persons so defrauded, any assessment made for the work done under such contract; and where there is more than one contractor each contractor shall make such affidavit." We have already discussed the effect of such an agreement under the general law.[10] Under the charter, the right of a nonconsenting owner to set up such an agreement as a defense to an assessment is clear.

§ 864. **Form and Contents of the Assessment.**—The form and contents of the assessment and diagram, as prescribed by section 7 of chapter 2, are practically the same as prescribed by section 8 of the Vrooman Act, already discussed.[11] "When any work in or upon any public street shall have been completed according to contract, and the affidavit mentioned in the next preceding section shall have been made, the board shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of this article, according to the nature and character of the work. The assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, the amount of each assessment, the name of the owner of each lot (if known to the board, and if not known, the word 'unknown' shall be written opposite the number of the lot and the amount assessed thereon); the number of each lot assessed, and shall have attached thereto a diagram exhibiting the street or street crossing on which the work has been done, and showing the relative location of each distinct lot to the work done, numbered to correspond with the numbers

10 See ante, sec. 176.

11 For a discussion of the assessment and diagram under the Vrooman Act, see ante, sec. 203 ff.

in the assessment, and showing the number of front feet assessed for said work. A mistake in the name of the owner shall not invalidate any assessment. When the expense of such work falls in part upon any person, company or corporation having railroad tracks upon the street where such work has been done, said assessment shall include an assessment against said person, company or corporation, for its legal proportion of said expense, and the same shall constitute a lien upon the roadbed, rolling stock, franchises and other property of such person, company or corporation, for a period of two years from the date of recording the warrant, assessment and diagram hereinafter provided for." The main differences between this and the corresponding section of the Vrooman Act are as follows: (1) The assessment is made by the board instead of by the superintendent of streets. (2) Under the charter, a mistake in the name of the owner is immaterial. Under the Vrooman Act, an assessment made against the wrong party is invalid. (3) The provision for an assessment upon railroad property is additional. Section 11 provides: "In making all assessments the board of public works shall act as a board, and the assessment shall be authenticated by the signatures of all the members thereof."

§ 865. **Apportionment of Expense—In General.**—Section 8 provides:

"The expense of all work or improvement done upon any part of said streets, lanes, alleys, places or courts, under the order of the supervisors, shall be borne and paid for as follows:

"First—The city and county shall pay out of the general fund the expense:

"a. Of all work done on streets, crossings and intersections of streets that have been or may be accepted by the city and county, after the acceptance of the same, and all repairs and improvements deemed of urgent necessity that may be made upon the public streets and highways.

"b. Of all work done in front of, or that may be assessed to, property owned by the city and county or by any department thereof.

"c. Of all work done in front of, or that may be assessed to, property owned by the United States.

"Second—The expense of all sewers, cesspools, manholes, culverts and drains, and of all grading, planking, macadamizing, paving, piling and capping any street, or portion thereof, and of all curbs thereon, and of all work done on sidewalks, shall be assessed upon the lands within the block or blocks adjacent thereto as herein provided, except where by an assessment district it may be provided otherwise.

"Third—The expense of all work on such portion of any street required by law to be kept in order by any person, company, or corporation, having railroad tracks thereon, shall be borne and paid for by such person, company or corporation, and shall be included in the assessment hereinbefore provided for.

"No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty percentum of the value at which said property was assessed upon the last preceding assessment-book of the city and county; provided, however, that such limitation shall not be applicable to any assessment or assessments that may be levied upon any property for the construction of sewers and appurtenances thereto."

The first subdivision imposes a heavier liability upon the city than is imposed by the Vrooman Act. It is a general principle that neither city property nor property of the United States is liable for street assessments.[12] The second subdivision adds nothing. It corresponds in a general way to the first subdivision of section 7 of the Vrooman Act. The third subdivision is an important addition, inasmuch as it expressly authorizes an assessment upon a railroad

12 See ante, sec. 186.

company for work required to be done by it. The last paragraph contains an important limitation upon the power of assessment. The Vrooman Act contains no such limitation. Some of the prior acts have limited the amount of any one assessment; but this expressly limits the aggregate amount.

§ 866. **Same—Rules Governing.**—Section 9 provides:

"Except where the expense incurred for the street work and improvement authorized herein is to be assessed upon a district as hereinafter provided, such expense, other than that to be paid by a person, company or corporation having tracks on the street where such work and improvement has been done, shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work.

"Subdivision Two.—The expense of all improvement except such as is done by contractors under the provisions of section sixteen of this chapter, until the streets, avenues, street crossings, lanes, alleys, places or courts are finally accepted, as provided in section twenty-three of this chapter, shall be assessed upon the lots and lands as provided in this section according to the nature and character of the work.

"Subdivision Three.—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot on the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

"Subdivision Four.—Where a main street terminates in another main street, the expense of the work done on one-

half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main street, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

"Subdivision Five.—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots half way on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street if it does not meet another.

"Subdivision Six.—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place, or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

"Subdivision Seven.—Where a subdivision street, avenue, lane, alley, place, or court, terminates in another street, avenue, lane, alley, place, or court, the expense of the work done on one-half the width of the subdivision street, avenue, alley, place or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street or avenue, lane, alley, place, or court so terminating, according to its frontage thereon, halfway on each side, respectively, to the next street, avenue, lane, alley, court, or place, or the end of such street, avenue, lane, alley, place, or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

"Subdivision Eight.—Where any work mentioned in this chapter, manholes, cesspools, culverts, crosswalks, piling and capping excepted, is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion

of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered. When sewering or resewering is ordered to be done under the sidewalk or only on one side of a street for any length thereof, the assessment for its expense shall be made only upon the lots and lands fronting nearest upon that side, and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

"Subdivision Nine.—Any owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the supervisors, may perform at his or their own expense (after obtaining permission from the board of public works so to do, but before said board has passed its resolution of intention to recommend grading inclusive of this) any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon may procure, at his or their own expense, a certificate from the city engineer setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter may file said certificate in the office of the board. Said certificate shall be recorded in a properly indexed book kept for that purpose in the office of the board. Whenever thereafter the supervisors order the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contract must express the price by the cubic yard for cutting and filling in grading, and such owner or owners, and his or their successors in interest, shall be entitled to credit on the assessment upon his or their lots and lands fronting on said street for grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their said certificate, at the prices named in the contract for said cut-

ting and filling; or, if the grade meanwhile has been legally changed, only for so much of said certified work as would be required for grading to the grade as changed. Such owner or owners shall not be entitled to any credit that may be in excess of the assessments for grading upon the lots and land owned by him or them, and proportionately assessed for the whole of said grading. The board shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the changed grade so much of said certified work as would be required for grading thereto, and shall enter corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands owned respectively by said certified owners and their successors in interest; but he shall not include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners or their successors in interest. When any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, except grading, on such street, in front of any block, at his or their own expense, and the supervisors shall subsequently order any work to be done of the same class in front of the same block, the work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, as provided in subdivision ten of this section; but the work so done at the expense of such owner or owners shall be upon the official grade, and in condition satisfactory to the board of public works at the time said order is passed.

"Subdivision Ten.—The board of public works may include in the resolution of intention any of the different kinds of work mentioned in this chapter, and it may except therefrom any of said work already done upon the street to the

official grade. The lots and portions of lots fronting upon said accepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; but this shall not be construed so as to affect the special provisions as to grading contained in subdivision nine of this section.

"Subdivision Eleven.—When the resolution of intention declares that the expense of the work and improvement is to be assessed upon a district, immediately after the contractor has fulfilled his contract to the satisfaction of the board of public works, or to the satisfaction of the supervisors on appeal, the board of public works shall proceed to estimate upon the lands, lots, or portions of lots within said assessment district as shown by the diagram provided for in section five of this chapter, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the expense of such proposed work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portion of lots, and subdivisions of land in said district benefited thereby, to wit: Upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in this chapter."

In most respects, the foregoing is the same as section 7 of the Vrooman Act, which has already been discussed in detail.[13]

§ 867. **Other Methods of Assessment.**—Section 10 provides: "If at any time there shall be any street work or improvement done, and none of the methods hereinbefore provided are legally sufficient to authorize the board of public works to make an assessment to pay for the expense thereof, then said board shall, before it passes a resolution

[13] See ante, sec. 184 ff.

of its intention to recommend the ordering of said work or improvement, establish by resolution a method by means of which such assessment shall be made; and on the completion of the work or improvement to the satisfaction of said board, or to the satisfaction of the supervisors on appeal, said board shall make an assessment to pay the expense thereof according to the method established by said resolution." It is difficult to see in what case an assessment under the district plan would not be legally sufficient for any street work.

§ 868. **Warrant—Record—Lien.**—Section 12 provides:

"To said assessment shall be attached a warrant which shall be signed by the president of the board of public works and countersigned by the secretary thereof. Said warrant shall be substantially in the following form:

"By virtue hereof the board of public works of the city and county of San Francisco, by the authority vested in it, does authorize and empower (name of contractor) his (or their) agents, or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his (or their) warrant for the same.

"(Date) ———. (Name of president of board of public works.)

"Countersigned by (name of secretary of board of public works).

"Said warrant, assessment and diagram shall be recorded in the office of the board. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment and diagram, all persons interested in said assessment shall be deemed to have notice of the contents of the record thereof.

"After said warrant, assessment and diagram are recorded, the same shall be delivered to the contractor, or his agent or assigns, on demand, but not until after the payment to the board of the incidental expenses not previously paid by the contractor or his assigns. By virtue of said warrant said contractor, or his agents or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments."

This is practically identical with the corresponding portion of section 9 of the Vrooman Act, which has already been discussed.[14] It omits, however, the uncertain provision as to the engineer's certificate. The duties of the superintendent of streets under the Vrooman Act are imposed upon the board of public works.

§ 869. **Reassessment.**—Section 12 further provides: "When it shall appear by the final judgment of any court in this state having jurisdiction to render such judgment, that any suit brought to foreclose the lien of any assessment for street work made under this chapter, or in the recording thereof, has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality, thereof or therein, or in the return on the warrant issued pursuant to any such assessment or in the recording of any such warrant, any person interested therein may, at any time within seven months after the entry of said final judgment, apply to the board for another assessment to be issued in conformity to law; and the board shall, within sixty days after the time of said application, make and deliver to said applicant a new assessment, diagram and warrant in accordance with law, and sign, record and authenticate the same as above provided. Such assessment shall be a lien upon the lots of land set out therein for the period of two years from the date of its recording, and suit may be brought to enforce said lien as provided in this chapter. Should such final

[14] See ante, sec. 215 ff.

judgment be that of the Superior Court for the city and county and an appeal therefrom to the Supreme Court of the state has been taken, no such other assessment shall be made until said appeal has been determined."

This is very similar to the corresponding provision of section 9 of the Vrooman Act, and practically the same rules apply.[15] The main differences are in the time allowed for application for and for making the new assessment. This provision is express as to the effect of an appeal.

§ 870. **Demand and Return.**—Section 13 provides:

"The contractor or his assigns, or some person on his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made, the contractor, his assigns, or some person on his or their behalf, shall receipt the same upon the assessment in the presence of the person making such payment, and shall also give a receipt if demanded. When the persons so assessed, or their agents, cannot conveniently be found or when the owner of the lot is stated as 'unknown' upon the assessment, then said contractor or his assigns, or some person on his or their behalf, shall publicly demand payment on the premises assessed.

"The warrant shall be returned to the board of public works within thirty days after its date with a return indorsed thereon, signed by the contractor or his assigns, or some person on his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid in whole or in part, and the amount thereof. Thereupon the secretary of the board shall record the return so made in the margin of the record of the warrant and assessment.

"The board can at any time receive the amount due upon any assessment and warrant issued by it and give a good and sufficient discharge therefor; but no such payment so

[15] See ante, sec. 246 ff.

made after suit has been commenced shall operate, without the consent of the plaintiff in the action, as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff.

"The board may release any assessment upon the books of its office on the payment to it of the amount of the assessment with interest against any lot or on the production to it of the receipt of the party or his assigns to whom the assessment and warrant were issued. If any contractor shall fail to return his warrant within the time and in the form provided in this section he shall thenceforth have no lien upon the property assessed; but if any warrant is lost, upon proof of such loss a duplicate may be issued, upon which a return may be made with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of seven per centum per annum until paid."

This is practically the same as section 10 of the Vrooman Act, which has already been discussed.[16] The chief differences are: (1) The board of public works is given the duties imposed upon the superintendent of streets by the Vrooman Act. (2) The charter does not provide for the recording of the contract. (3) The charter provides for seven per cent interest, while the general law provides for ten per cent.

§ 871. **Appeal to Supervisors.**—Section 14 provides:

"The owners, whether named in the assessment or not, the contractor or his assigns, and all other persons directly interested in any work provided for in this chapter, or in the assessment, feeling aggrieved by any act or determination of the board of public works in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the

[16] See ante, sec. 232 ff.

assessment or other act, determination, or proceedings of the board, shall, within thirty days after the date of the warrant, appeal to the supervisors, by briefly stating their objections in writing and filing the same with the clerk of the supervisors. Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days. Upon such appeal the supervisors may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the board relative to said work, may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just; and require the work to be completed according to the directions of the supervisors, and may at their option direct the board of public works to correct the warrant, assessment or diagram in any particular, or to make and issue a new warrant, assessment and diagram to conform to the decisions of the supervisors in relation thereto.

"All the decisions and determinations of the supervisors, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities, which the supervisors might have remedied and avoided; and no assessment shall be held invalid, except upon appeal to the supervisors, as provided in this section, for any error, informality or other defect in the proceedings prior to the assessment, or in the assessment itself, where the board of public works has acquired jurisdiction to make the same."

This is almost identical with section 11 of the Vrooman Act, which has been already discussed.[17] It is to be noted that the appeal is made to the supervisors.

17 See ante, sec. 251 ff.

§ 872. **Enforcement of the Lien.**—Section 15 provides:

"At any time after the period of thirty-five days from the day of the date of the warrant, or if an appeal has been taken to the supervisors, then, at any time after five days from the decision of the supervisors on such appeal, or after the return on the warrant, after the same may have been corrected, altered or modified, as herein provided, but not less than within thirty-five days from the date of the warrant, the contractor or his assignee may sue in his own name the owner or the mortgagee of the land, lots, or portions of lots assessed on the day of the date of the recording of the warrant, assessment and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of seven percentum per annum until paid.

"In all cases of recovery under the provisions of this chapter the plaintiff shall recover the sum of fifteen dollars in addition to the taxable costs, as attorney's fees, but not any percentage upon said recovery. When suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars, as attorney's fees in addition to all taxable costs, notwithstanding that the suit may be settled or a tender be made before a recovery in said action, and he may have judgment therefor.

"Said warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the board of public works and of the supervisors upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the lots of land assessed,

and to order such premises to be sold on execution as in other cases of the sale of real estate by the process of said courts. In all actions brought to enforce the lien of assessments made pursuant to the provisions of this chapter the proceedings therein shall be governed and regulated by the provisions of this chapter, and, when not in conflict herewith, by the codes of this state."

This is practically the same as section 12 of the Vrooman Act, which has already been discussed.[18] The main difference is that the charter allows only seven per cent interest. One clerical error, which makes one sentence contradictory, will be noted. The first sentence authorizes suit, "but not less than within thirty days." What is meant is clearly "not less than thirty days."

§ 873. **Repair of Streets—Notice.**—The charter procedure for the repair of unaccepted streets is similar to that prescribed by section 13 of the Vrooman Act; but the charter requires more formalities as to the contract. Section 16 of chapter 2 provides: "When, in the judgment of the board of public works, any portion of the roadway of any improved street, avenue, lane, alley, court or place, or any portion of any sidewalk thereof, in the city and county, none of which has been accepted by the supervisors as by law or as in this charter provided, shall be so out of repair or in such condition as to endanger persons or property passing thereon, or so as to interfere with the public convenience in the use thereof, the board is authorized to notify the owner or owners of any lot fronting on said portion of said street, avenue, lane, alley, court or place, or fronting on such portion of said sidewalk so out of repair or in such condition as aforesaid, by a notice in writing to be delivered to him, or his agent, or to any of the persons referred to in section 19 of this chapter (and for the purposes of this section any of such persons shall be deemed the 'owner'), requiring such owner to repair, or reconstruct, or improve forthwith, in such man-

[18] See ante, sec. 266 ff.

ner and with such material as the board may determine and direct, said portion of said street, avenue, lane, alley, court or place to the center line thereof, or said portion of said sidewalk in front of the lot of which he is the owner." This provision, while differing in wording from section 13 of the Vrooman Act, is in effect the same; and is to be construed in the same way.[19]

§ 874. **Same—Award of Contract.**—The procedure for awarding the contract for repairs is similar in several respects to that prescribed for the general award of contracts. It is much more detailed than the procedure prescribed by the corresponding section of the Vrooman Act. Section 16 provides:

"If said repair, reconstruction or improvement be not begun within five (5) days after notice given as aforesaid, and diligently and without interruption prosecuted to completion, the board may, if it so determine, enter into a contract with any suitable person at the expense of such owner for the doing of the work of the required repair, or reconstruction, or improvement, after the following proceedings as in this section hereinafter provided shall have been taken by the board.

"The board shall cause a notice inviting sealed bids for the doing of said required work to be conspicuously posted in its office for three days (legal holidays excepted), together with the specifications for such required work. The said notice shall specify the day and hour when such sealed bids must be delivered to the board, and shall contain a general description of the work to be done, the time within which the work is to be commenced and when to be completed, and the amount of the certified check hereinafter provided for as a guaranty for the faithful performance of the contract, and shall refer to the specifications posted therewith. On the day

[19] As to the repair provisions of the Vrooman Act, see ante, secs. 317–327. See, also, Heath v. Manson, 147 Cal. 694, 82 Pac. 331, interpreting the repair provisions of this charter.

and at the hour specified in said notice, the board shall assemble and remain in session for at least one hour, and all such bids shall be delivered to the board while it is so in session and within the hour named in the said notice. At the expiration of the hour stated in the said notice within which the bids will be received, the board shall, in open session, open, examine and publicly declare the same, and an abstract of each bid shall be recorded in the minutes of the board by the secretary. The board shall award the contract to the lowest responsible bidder, if in its judgment the bid of such bidder is reasonable and just.

"The board may for good cause reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract awarded to him by the board.

"No bid shall be considered by the board unless it be accompanied by a check, certified by a responsible bank, payable to the order of the clerk of the supervisors of the city and county, for an amount determined by the board and specified in the said notice inviting bids. Such check shall be held by the board as a guaranty that the bidder to whom the contract has been awarded, as hereinbefore provided, will enter into contract to do said work and faithfully perform such contract.

"If said bidder fails or refuses to enter into the contract to do said work as hereinafter provided, or if after having entered into the said contract said bidder fails to faithfully perform the contract, then the said certified check accompanying his bid shall be forfeited to the city and county, and shall be collected and paid into the general fund thereof.

"The bidder to whom the contract for the said work has been awarded shall enter into a written contract therefor with the board of public works within five (5) days after the date of the award thereof. Upon the completion of the required repair, reconstruction or improvement by the contractor as aforesaid to the satisfaction of the board, it shall make and deliver to the contractor a certificate to the effect

that such repair, reconstruction or improvement has been properly made by said contractor, and that the charges for the same are reasonable and just, and that the board of public works has accepted the same. Upon the issuance of the said certificate the board shall surrender to the contractor the certified check hereinbefore provided for.

"Until the sidewalk or the roadway of any improved street, avenue, lane, alley, court or place in the city and county is finally accepted as by law or as in this charter provided, the obligation to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon."

§ 875. **Same—Enforcement of Lien.**—Section 17 provides: "If the expense of the work and material for the repairs provided for in the last preceding section be not paid on demand to the contractor so employed, or his agent or assignee, said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant for the amount contracted to be paid; and the certificate provided for in said section shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the board of public works in a book kept by it in the office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien as in case of other assessments provided for in this chapter." This is practically identical with section 14 of the Vrooman Act, which has already been discussed.[20]

§ 876. **Same—Right to Impose Penalty.**—Section 18 provides: "In addition to the remedies above given the supervisors may prescribe the penalties that shall be incurred by any owner or person neglecting or refusing to make repairs when required, as hereinbefore provided. Such penalties shall be enforced for the use of the city and county by

[20] See ante, sec. 325.

prosecution in the name of the people of the state of California in the court having jurisdiction thereof, and may be applied in the case of fines, to the payment of expense of any such repairs not otherwise provided for." This is similar to section 15 of the Vrooman Act, which has already been discussed.[21] It can be upheld only upon the theory that it is a proper exercise of the police power.

§ 877. **Definition of Owner.**—Section 19 provides: "The person owning the fee, or the mortgagee of such fee, or the person who, on the day the action is commenced, appears by deed duly recorded in the county recorder's office of the city and county, to have the legal title to the land, or the person in possession of lands, lots, portion of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as executor, administrator or guardian of the owner, shall be regarded, treated and deemed to be the 'owner' for all the purposes of this chapter. And in case of property leased, the possession of the tenant or lessee holding and occupying under such persons shall be deemed to be the possession of such owner." This is practically the same as section 16 of the Vrooman Act. It includes a mortgagee in the definition, however.

§ 878. **Right of Tenant to Pay Assessment.**—Section 20 provides: "Any tenant or lessee of any lot of land on which has been imposed an assessment under the provisions of this chapter may pay said assessment, or he may discharge any liability imposed thereon by virtue of the provisions of this chapter, or he may redeem the property within the time prescribed by law, if legally sold on execution, and may deduct the amount so paid from the rents due and to become due from him; and he shall have a lien upon, and may retain possession of, said lots until the amount so paid and advanced, with legal interest thereon, be satisfied from accruing rents or by payment by the owner." This corre-

[21] See ante, sec. 326.

sponds to section 17 of the Vrooman Act. Of course, a tenant paying a void assessment cannot hold the owner responsible.

§ 879. **Effect of Records as Evidence.**—Section 21 provides: "The records kept by the board of public works shall have the same force and effect as other public records, and duly certified copies therefrom may be used in evidence with the same effect as the originals. Said records shall, during all office hours, be open, free of charge, to the inspection of any citizen wishing to examine them." This is practically identical with section 18 of the Vrooman Act.

§ 880. **Service of Notices.**—Section 22 provides: "Notices in writing required to be given by the board may be served by any person over the age of twenty-one years, and the fact of such service may be verified by the oath of the person making it. Such oath may be taken before the secretary of said board or before any member thereof." This corresponds to section 19 of the Vrooman Act.

§ 881. **Acceptance of Streets.**—Section 23 provides: "When any street or portion of a street has been or shall hereafter be fully constructed to the satisfaction of the board of public works and of the supervisors, and is in good condition throughout, and a sewer, gas-pipes, and water-pipes are properly laid therein, the same shall be accepted by the supervisors by ordinance; and thereafter such street or portion of a street shall be kept in repair and improved by the city and county. The supervisors shall not accept any portion of a street less than the entire width of a roadway, including the curbing, and one block in length, or one entire crossing; but they may partly or conditionally accept any street, without a sewer or gas-pipes or water-pipes therein, if the ordinance of acceptance expressly states that they deem such sewer, or gas-pipes or water-pipes to be then unnecessary. In such case the lots of land previously or at any time assessable for the cost of constructing a sewer

shall remain and be assessable for such cost and for the cost of repairs and restoration of the street damaged in said construction, whenever the supervisors shall deem a sewer to be necessary and shall order it to be constructed. The board of public works shall keep in its office a register of all streets accepted by the supervisors under this section, which register shall be indexed for easy reference thereto." This corresponds with section 20 of the Vrooman Act, and is governed by the same rules.[22]

§ 882. Procedure to Compel Work by Street Railroads.— Section 24 provides:

"The board of public works may at any time, without any application therefor, recommend to the supervisors to order the paving or macadamizing of the portion of any street required by law be paved or macadamized by the person, company or corporation having railroad tracks thereon. Upon such recommendation the supervisors shall by ordinance order said work to be done and direct said board to notify said person, company, or corporation of the fact of the passage of such ordinance.

"The secretary of said board shall thereupon forthwith in writing notify said person, company or corporation of the passage of said ordinance; and if said person, company or corporation shall not within ten days after receiving said notice commence in good faith to do said work and prosecute the same diligently to completion, the board shall invite sealed proposals for doing said work in the manner provided in this article; and all the provisions of this article in regard to such proposals, to the awarding of contracts, to the execution of contracts, and to the doing of public work, shall apply to all similar proceedings taken under this section. On the completion of the work to the satisfaction of the board the contractor shall be entitled to recover from such person, company or corporation the contract price for the expense of said work, together with

[22] See ante, sec. 328 ff.

incidental expenses, in an action instituted in a court of competent jurisdiction. On the trial of such action, the certificate of the board of the completion of said work to its satisfaction shall be prima facie evidence of the regularity of all the proceedings prior thereto and of plaintiff's right to recover in said action."[23]

§ 883. **Proceedings must Include the Whole Width of the Street.**—Section 25 provides: "Except as otherwise in this chapter specifically provided, no ordinance for the improvement of any street other than for sewers, sidewalks and curbs, except for the improvement of streets constituting or lying along the water front of the city and county, and except for such work as is provided for in the next preceding section, shall be passed by the supervisors without extending said improvement throughout the whole width of such street."

§ 884. **Right to Do Work at Public Expense.**—Section 30, as amended in 1910, provides: "Upon the recommendation of the board of public works, the board of supervisors, by an affirmative vote of not less than fourteen members thereof, may authorize the improvement, at the expense of the city and county, of any public street in the city and county not finally accepted as provided in section 23 of this chapter, in case such improvement shall be deemed by the supervisors to be of urgent public necessity, and of more than local or ordinary public benefit; and the provisions of section 5 of this chapter shall not be applicable to such improvement.

"The said improvement may be made by contract, as provided in section 14 of chapter 1 of this article, or by and under the direction of the board of public works, as the supervisors may determine."

[23] See ante, sec. 342 ff.

DIVISION 2.

STREET OPENING AND CLOSING.

§ 885. In general.
§ 886. Scope of authority.
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§ 902. Payment of warrants.
§ 903. Procedure in case of deficiency.
§ 904. Procedure where title defective.
§ 905. Closing or changing lines of streets.

§ 885. **In General.**—The San Francisco charter adopts the Street Opening Act of 1889, with few changes, as the procedure for the opening of streets. It is unnecessary to repeat what has already been said in regard to that act. I shall merely state the charter provisions, and point out the variations from the general law. One of the chief differences is that under the charter the board of public works performs the duties imposed upon the commissioners and upon the superintendent of streets by the general law.

§ 886. **Scope of Authority.**—Section 1 of chapter 3 of article VI provides: "Whenever the public interest or convenience may require, the supervisors shall have full power and authority to order the opening, extending, widening, straightening or closing up, in whole or in part, of any street, avenue, lane, alley, court, or place within the city

and county and to condemn and acquire any and all land and property necessary and convenient for that purpose." This is practically identical with section 1 of the Street Opening Act of 1889, which has already been discussed.[1]

§ 887. **Resolution of Intention.**—Section 2 provides:

"Before ordering any work to be done or improvement made, which is authorized by the preceding section, the supervisors shall pass a resolution declaring their intention so to do, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof.

"The supervisors may, in and by said resolution, declare and determine that the whole cost and expense of such work or improvement, or any proportion thereof, shall be paid out of the revenues of the city and county."

The first paragraph of this section is practically the same as section 2 of the act of 1889.[2] It is unnecessary, however, for the resolution of intention to designate the newspaper in which notices shall be published, for the subsequent sections provide for publication in the official newspaper. The second paragraph of the section is an addition. The resolution of intention should declare what portion of the expense is to be borne by the city.[3]

§ 888. **Notice of Intention.**—Section 3 provides: "The clerk of the supervisors shall transmit to the board of public works a certified copy of such resolution, and upon receipt thereof said board of public works shall cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. Said notice shall be headed

1 See ante, sec. 662 ff.

2 See ante, sec. 675 ff.

3 See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

'Notice of Public Work' in letters not less than one inch in length, shall be in legible characters, state the fact of the passage of the resolution, its date, and briefly the work of improvement proposed, and refer to the resolution for further particulars. Said board shall also cause a notice, similar in substance, to be published for a period of ten days in the official newspaper." This corresponds to section 3 of the act of 1889.[4] The differences are in the substitution of the board of public works for the street superintendent, and in the provision that the notice shall be published in the official paper. It would seem necessary for the board of public works to take official action in regard to the posting and publication.

§ 889. **Objections.**—Section 4 provides: "Any person interested objecting to said work or improvement, or to the extent of the district or lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice, which objection shall be delivered to the clerk of the supervisors, who shall indorse thereon the date of its reception by him, and at the next meeting of the supervisors after the expiration of said ten days lay said objection before the supervisors, who shall fix a time for hearing said objections, not less than one week thereafter. The clerk of the supervisors shall notify the persons making such objections by depositing a notice thereof in the postoffice, postage prepaid, addressed to such objector." This is practically identical with section 4 of the act of 1889.[5]

§ 890. **Hearing and Determination.**—Section 5 provides: "At the time specified, or to which the hearing may be adjourned, the supervisors shall hear the objections urged, and pass upon the same, and their decision shall be final

[4] See ante, sec. 678 ff.
[5] See ante, sec. 681 ff.

and conclusive. If such objections are sustained all proceedings shall be stopped, but proceedings may again be commenced at any time by giving notice of intention to do said work or make said improvement. If such objection is overruled by the supervisors, the proceedings shall continue the same as if such objection had not been made. At the expiration of the time prescribed, during which objections to said work or improvement may be made, if no objections shall have been made, or if objections shall have been made, and the supervisors, after hearing, shall have overruled the same, the supervisors shall be deemed to have acquired jurisdiction to order any of the work to be done or improvement to be made which are authorized by section 1 of this chapter, and by resolution shall order said work to be done or improvement to be made, as the case may be." This is practically identical with section 5 of the act of 1889.[6]

§ 891. The Assessment of Benefits and Damages.—Sections 6 and 7 of the act of 1889 relate to the appointment of commissioners. Inasmuch as the charter does not provide for commissioners, these sections are not embodied in the charter. Section 6 of the charter corresponds with section 9 of the act of 1889.[7] It provides: "Upon the passage of said resolution the clerk of the supervisors shall transmit a certified copy thereof to the board of public works. Upon receipt of the same said board of public works shall proceed to view the lands described in the resolution of intention, and may examine witnesses on oath to be administered by any member of said board in relation thereto. Having viewed the land to be taken, and the improvements affected, and considered the testimony presented, they shall proceed with all diligence to determine the value of the land and the damage to improvements and property effected, and also the amount of the expenses incident to said work or

[6] See ante, secs. 681–681.

[7] See ante, sec. 689 ff.

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[6] See ante, secs. 681–684.

[7] See ante, sec. 689 ff.

§ 895. Notice of Filing Report.—Section 10 provides: "Said report and plat shall be filed in the clerk's office of the supervisors, and thereupon the clerk of said board shall give notice of such filing by publication for at least ten days in the official newspaper. Said notice shall also require all persons interested to show cause, if any, why such report should not be confirmed, before the supervisors on or before a day fixed by the clerk thereof, and stated in said notice, which day shall not be less than thirty days from the first publication thereof." This is practically identical with section 13 of the act of 1889.[12] The newspaper, however, is here particularly designated.

§ 896. Objections to Report—Hearing.—Section 11 provides: "All objections shall be in writing, and filed with the clerk of the supervisors, who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the supervisors, who shall fix a time for hearing the same, of which the clerk shall notify the objectors in the same manner as objectors to the original resolution of intention. At the time set, or at such other time as the hearing may be adjourned to, the supervisors shall hear such objections and pass upon the same; and at such time, or, if there be no objections, at the first meeting after the day set in said order to show cause, or such other time as may be fixed, shall proceed to pass upon such report, and may confirm, correct or modify the same, or may order the board of public works to make a new assessment, report and plat, which shall be filed, notice given, and hearing had, as in the case of an original report. If the supervisors shall have determined that a certain proportion of the cost and expense of such work and improvement shall be paid out of the revenues of the city and county, they shall deduct such proportion from the total amount of the cost and expense thereof as finally fixed and determined in and by said assessment and report, and the amount of such proportion shall be

[12] See ante, sec. 698.

paid out of any revenues appropriated for such purpose to the persons respectively entitled thereto, at the same time and in the same manner as in section 15 hereof provided, and the balance shall be raised by assessment as hereinafter provided." The first part of this section is practically identical with section 14 of the act of 1889.[13] The last sentence is an addition.

§ 897. **Lien of Assessment.**—Section 12 provides: "The clerk of the supervisors shall forward to the board of public works a certified copy of the report, assessment and plat, as finally confirmed and adopted by the supervisors, with a statement of any deduction that may be made on account of payments made out of the revenues of the city and county, as in section 11 provided. Such certified copy shall thereupon be the assessment-roll. Immediately upon receipt thereof by the board of public works the assessment therein contained shall become due and payable and shall be a lien upon all the property contained or described therein." This is similar to section 15 of the act of 1889.[14] The provision for a deduction on account of payments made by the city is an addition.

§ 898. **Collection of Assessment.**—Section 13 provides: "The board of public works shall thereupon give notice by publication in the official newspaper for ten days that it has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to said board within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, will be added

[13] See ante, secs. 699–701.

[14] See ante, sec. 702.

thereto. When payment of any assessment is made to said board of public works it shall cause to be written the word 'paid,' and the date of payment, opposite the respective assessments so paid, and the names of persons by or for whom said assessment is paid, and shall, if so required, give a receipt therefor. On the expiration of said thirty days all assessments then unpaid shall be and become delinquent, and said board of public works shall certify such fact at the foot of said assessment-roll and shall add five per cent to the amount of each assessment so delinquent." This is similar to the first part of section 16 of the act of 1889.[15]

§ 899. **Same—Sale for Delinquency.**—Section 14 provides: "The said board of public works shall, within five days after the date of said delinquency, proceed to advertise and collect the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty (50) cents for each lot, piece or parcel of land separately assessed, by the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes; and after the date of said delinquency, and before the time of such sale herein provided for, no assessment shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the costs of advertising then already incurred, shall be paid therewith. Said list of delinquent assessments shall be published for five days in the official newspaper before the day of sale of such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of said board of public works. All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the board of public works may collect for each certificate fifty cents and for each deed one dollar. All provisions of the law, in

[15] See ante, sec. 703 ff.

reference to the same and redemption of property, for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certain certificates and execution of deeds. The deed of the board of public works made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee. It shall be conclusive evidence of the necessity of taking or damaging the lands taken or damaged, and of the correctness of the compensation awarded therefor. The board of public works shall, from time to time, pay over to the city treasurer all moneys collected by it on account of any such assessments. The treasurer shall, upon receipt thereof, place the same in a separate fund, designating such fund by the name of the street, avenue, square, lane, alley, court or place for the widening, opening or other improvement of which the assessment was made. Payment shall be made from said fund to the parties entitled thereto, upon warrants signed by the members of the board of public works, or a majority of them." This is almost identical with the latter part of section 16 of the act of 1889.[16] It was evidently copied carelessly, without consideration of the effect; for sales under the act of 1889 are governed by the tax law as it existed prior to 1895. It is probable that the provisions of the present general tax law, providing for sales to the state, will be held inconsistent with the purposes of the charter provision and therefore inapplicable.[17]

§ 900. **Warrants for Persons Entitled to Damages.**—Section 15 provides: "When sufficient money is in the hands of the treasurer, in the fund devoted to the particular work or improvement, to pay for the lands and improvements taken or damaged, and when in the discretion of the board

[16] See ante, sec. 706 ff.
[17] See ante, sec. 705.

of public works the time shall have come to make payments, it shall be the duty of said board to notify the owner, possessor or occupant of any land or improvements thereon to whom damages shall have been awarded, that a warrant has been drawn for the payment of the same, and that he can receive such warrant at the office of said board upon tendering a conveyance of any property to be taken; such notification, except in the case of unknown owners, to be made by depositing a notice, postage paid, in the postoffice, addressed to his last known place of abode or residence. If at the expiration of thirty days after the deposit of such notice he should not have applied for such warrant, and tendered a conveyance of the land to be taken, the warrant so drawn shall be deposited with the treasurer and shall be delivered to such owner, possessor or occupant upon tendering a conveyance as aforesaid, unless judgment of condemnation shall be had, when the same shall be canceled." This is practically the same as section 17 of the act of 1889.[18]

§ 901. **Eminent Domain Proceedings.**—Section 16 provides: "If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor as aforesaid, or objects to the report as to the necessity of taking his land, the board of public works shall report such facts to the supervisors, who shall thereupon cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity. Such proceedings shall be brought in the name of the city and county, and have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of such portion of the

[18] See ante, sec. 720.

special fund as may remain in the treasury, so far as the same can be applied. At any time after trial and after judgment has been entered, or preceding an appeal, the court may order the treasurer to set apart in the treasury a sufficient sum from the fund appropriated to the particular improvement to answer the judgment and all damages, and thereupon may authorize and order the city and county to enter upon the land and proceed with the proposed work and improvement. In case of a deficiency in said fund to pay the whole of such judgment and damages, the supervisors may, in their discretion, order the balance thereof to be paid out of the general fund of the treasury or to be distributed by the board of public works over the property by a supplementary assessment; but in the last-named case, in order to avoid delay, the supervisors may advance such balance out of any appropriate fund in the treasury, and reimburse the same from the collections of the assessment. Pending the collection and payment of the amount of the judgment and damages, the court may order such stay of proceedings as may be necessary." This is practically the same as section 18 of the act of 1889.[19]

§ 902. **Payment of Warrants.**—Section 17 provides: "The treasurer shall pay such warrants out of the appropriate fund, and not otherwise, in the order of their presentation, provided, that warrants for land or improvements taken or damaged shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money is and remains in the fund to pay all warrants of the first class before paying any of the second." This is practically the same as section 19 of the act of 1889.[20]

§ 903. **Procedure in Case of Deficiency.**—Section 18 provides: "If after the sale of property for delinquent assessments there should be a deficiency, and there should be unreasonable delay in collecting the same, or if for the purpose

[19] See ante, sec. 724 ff.

[20] See ante, sec. 735.

of equalizing the assessments supplying a deficiency, or for any cause it appears desirable, the board of public works may so report to the supervisors, who may order them to make a supplementary assessment and report the same in manner and form as the original, and subject to the same procedure. If by reason of such supplementary assessment, or for any cause, there should be at any time a surplus, the supervisors may appropriate the same and declare a dividend pro rata to the parties paying the same, and they, upon demand, shall have the right to have the amount of such pro rata dividends refunded to them, or credited upon any subsequent assessment for taxes made against said parties in favor of said city and county." This is practically the same as section 20 of the act of 1889.[21]

§ 904. **Procedure Where Title Defective.**—Section 19 provides: "If any title attempted to be acquired by virtue of this act shall be found to be defective from any cause the supervisors may again institute proceedings to acquire the same as in this chapter provided, or otherwise, or may authorize the board of public works to purchase the same and include the cost thereof in a supplementary assessment, as provided in the last section." This is practically the same as section 21 of the act of 1889.[22]

§ 905. **Closing or Changing Lines of Streets.**—Section 27 of chapter 2 of article VI provides:

"Whenever it shall appear to the owners of a majority of the frontage of the property on any public street for the entire length of said street, or for the length of one or more blocks thereof, that said alignment of such street or portion thereof can be materially improved by changing the same, or that the closing of such street or said portion thereof shall by such owners be deemed advisable, and that the opening for use as a public street of land granted for such purpose, in substitution for such street or said portion thereof, be

21 See ante, sec. 736.
22 See ante, sec. 737.

proposed by such owners, they may petition the board of public works to recommend to the supervisors such proposed change in alignment, or such proposed closing and substitution.

"If in the judgment of the board of public works the proposed change in alignment, or the proposed closing and substitution, be deemed of public benefit, it may pass a resolution recommending to the supervisors such change of alignment, or such closing and substitution. Before passing such resolution, the said board shall cause a notice of such petition to be published in the official newspaper for a period of five days, exclusive of legal holidays, and which notice shall state the time and place at which the said board will consider such petition and hear objections thereto. Upon such recommendation as aforesaid, the supervisors may pass an ordinance in conformity therewith. In case the said board so recommends the closing of a public street or said portion thereof, and the substitution therefor proposed, and the supervisors by ordinance adopt such recommendation, the area of the said street or said portion thereof so closed shall revert to the owners of the property fronting thereon along the lines of their several property divisions, projected to the center line of the street or said portion thereof so closed. All grants of land or rights of way for a substituted public street, or for the change in the alignment of a public street, shall be without cost to the city and county, except as hereinafter provided, and all benefits and damages in connection with such substituted street, or such change of alignment, shall be adjusted by and between the owners of the properties affected by such grants therefor, in such manner as may be deemed equitable and just to them.

"The supervisors may upon the recommendation of the board of public works make available such public funds as they may deem proper wherewith to advance the interests of the general public in the changes of alignment of public streets herein provided for. The right of eminent domain as now prescribed, or as may be hereafter prescribed by the

laws of the state of California, may be exercised by the city and county, or by the property owners aforementioned, in the acquisition of the necessary properties for the change of alignment of existing streets, or the opening of a new street as herein provided for."

DIVISION 3.

CHANGE OF GRADE.

§ 906. In general.
§ 907. Resolution of intention.
§ 908. Claim of damage.
§ 909. Determination of damages.
§ 910. Right to subpoena and examine witnesses.
§ 911. Manner of making assessment of damages.
§ 912. Report of board of public works.
§ 913. Notice of filing of report.
§ 914. Objections to report, and hearing.
§ 915. Award of contract.
§ 916. Assessment for the work.
§ 917. Action of supervisors on assessment.
§ 918. Collection of the assessment.
§ 919. Payment of damages.
§ 920. Payment to contractor.
§ 921. Procedure in case of deficiency.
§ 922. Right to pay cost out of treasury.

§ 906. **In General.**—Chapter 6 of article VI of the charter provides a procedure for the change of street grades. In general, it follows the change of grade provisions of the Vrooman Act, which have already been discussed. Hence I shall not repeat what has been already said, but will merely state the provisions and point out the differences. Perhaps the main difference is that under the charter the work of the commissioners is done by the board of public works.

§ 907. **Resolution of Intention.**—Section 1 of chapter 6 provides: "The board of supervisors is hereby empowered, on the written recommendation of the board of public works, to change or modify the grade of any public street, avenue,

lane, alley, place or court to the grade set out in such recommendation, and to regrade, repave, sewer, sidewalk, curb or otherwise improve the same, so as to conform to such change or modified grade in the manner as hereinafter provided. Before any change of grade is attempted, the board of supervisors shall pass a resolution of intention to make such change or modification of grade, and it shall in the same resolution, when regrading, repaving, sidewalking, sewering, curbing or other improvement on such street or streets is contemplated in connection therewith, define and establish the district benefited and to be assessed for the payment of damages and for the expense of regrading, repaving, sewering, sidewalking, curbing, or otherwise improving such street or steets so as to conform with such change or modified grade; and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets or portion or portions thereof with the same or other material with which it was formerly graded, paved, sewered, sidewalked, curbed or otherwise improved, briefly describing the work to be done and providing that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such change or modified grade. When a change or modification of grade or grades is proposed to be made upon a street, avenue, alley, lane, court or place, which has already been sewered, paved, curbed or graded, no such change or modification of such grade or grades shall be made unless provision shall also be made for the resewering, repaving, recurbing or regrading of such street, avenue, alley, lane, court or place. One or more streets or blocks of streets may be embraced in the same resolution. Such resolution shall be published in the official newspaper. Such publication shall be made for ten days, and shall describe the proposed change or modification of grade, and when such resolution contemplates such work

by the oath of the petitioner or his agent. A failure so to petition shall be deemed and treated as a waiver of any claim for such damage or damages, and said resolution of intention shall so declare." This is practically the same as section 39 of the Vrooman Act.[1] The last sentence is an addition, but it merely states the rule as declared by the courts.[2]

§ 909. **Determination of Damages.**—Section 3 provides: "Whenever such petition or petitions have been filed, the board of public works shall estimate and assess the benefits, damages and costs of the proposed work of improvement upon each separate lot of land situated within such assessment district as said lot appears of record upon the last city and county assessment-roll." This is practically the same as section 40 of the Vrooman Act.[3]

§ 910. **Right to Subpoena and Examine Witnesses.**—Section 4 provides: "The board of public works shall have power to subpoena witnesses to appear before them to be examined under oath, which any member of the board of public works is authorized to administer." This is practically the same as section 42 of the Vrooman Act.[4]

§ 911. **Manner of Making Assessment of Damages.**—Section 5 provides: "The board of public works having determined the damages which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges and expenses of the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvements." This is practically the same as section 43 of the Vrooman Act.[5]

1 See ante, sec. 369.
2 See ante, sec. 369.
3 See ante, sec. 370 ff.
4 See ante, sec. 370 ff.
5 See ante, sec. 370 ff.

§ 912. **Report of Board of Public Works.**—Section 6 provides: "The board of public works shall make their report in writing, and shall subscribe to and file the same with the board of supervisors. In such report they shall describe separately each piece of property which will sustain damage and for which damages have not been waived, stating the name of the owner, if known, and the amount of damages each will sustain over and above all benefits. They shall also describe separately each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of the damages assessed against the same. In describing the lots to be assessed, reference may be had to a diagram of the property in such assessment district, such diagram to be attached to and made a part of the report of the board of public works. If in any case the board of public works shall find that conflicting claims of title exist, or shall be in ignorance or doubt of the ownership of any lot of land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in designation of the owner or owners of any land or improvement or particulars of their interest, shall not affect the validity of the assessment." This is a combination of section 44 and a portion of section 45 of the Vrooman Act.[6]

§ 913. **Notice of Filing of Report.**—Section 7 provides: "On the filing of said report, the clerk of the board of supervisors shall give notice of such filing by the publication of a notice for at least ten days in the official newspaper. Said notice shall require all persons interested to show cause, if any they have, before the board of supervisors, on a day to be fixed by the said board and stated in said notice, which day shall not be less than twenty days from the first publication thereof, why such report should not be confirmed." This is similar to a portion of section 45 of the Vrooman Act.[7]

[6] See ante, sec. 371.

[7] See ante, sec. 372.

§ 914. **Objections to Report, and Hearing.**—Section 8 provides: "All objections filed in response to said notice to show cause shall be in writing and filed with the clerk of the board of supervisors, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the board of supervisors, which shall fix a time not less than fifteen days thereafter for hearing the same, of which time the clerk shall notify the objectors by notice published in the official newspaper for a period of five days and by depositing a notice, postage prepaid, in the United States postoffice at San Francisco, addressed to each objector at his last known place of residence, at least ten days before the date of such hearing. At the time set, or at such other time to which the hearing may be adjourned, the board of supervisors shall hear such objections and pass upon them, and at such time shall proceed to pass upon such report and may confirm, correct or modify the same, or may order the board of public works to make a new assessment, report and plat, which shall be filed, notice given and had, as in the case of the original report." This is similar to a portion of section 46 of the Vrooman Act.[8]

§ 915. **Award of Contract.**—Section 9 provides: "After the report of the board of public works as to the damages caused by such change of grade has been finally passed upon by the board of supervisors, such board of public works shall prepare detailed plans and specifications subject to the approval of the board of supervisors, for regrading, paving, sewering, sidewalking, curbing or otherwise improving such street or streets as set forth in said resolution of intention and shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets, as the case may be, with the same or other material with which the same have been formerly graded, paved, sewered, sidewalked, curbed

[8] See ante, sec. 373.

or otherwise improved; first causing a notice, with such specifications to be posted conspicuously for fifteen days in or near the office of the board of public works, inviting sealed proposals or bids for doing such work, and shall also cause notice of said work, inviting said proposals and referring to the specifications posted and already on file, to be published five days in the official newspaper. All proposals or bids offered shall be accompanied by a check payable to the order of the clerk of the board of supervisors, and certified by a responsible bank for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for said amount, signed by the bidder and two sureties, who shall justify under oath in double said amount over and above all the statutory exemptions. Said proposals or bids shall be delivered to the secretary of the board of public works, and said board of public works shall, in open session, examine and declare the same; provided, however, that no proposal or bid shall be received unless accompanied by a check or a bond satisfactory to the board of public works. The board of public works may reject any or all bids and may award the contract to the lowest responsible bidder, or may re-advertise for proposals or bids for the performance of the work, as in the first instance, and thereafter proceed in the manner in this section provided; all checks accompanying bids shall be held by the secretary of the board of public works until the successful bidder has entered into a contract as herein provided, and in case he refuses so to do, then the amount of his certified check shall be declared forfeited to the city and shall be collected and paid into its general fund, and all bonds so forfeited shall be prosecuted and the amount thereof collected and paid into the said fund. Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore provided for the advertising for proposals for such work. Before being entitled to a contract, the successful bidder must advance to the secretary of the board of public works, for payment by him, the cost of

publication of the notices, resolutions, orders, or the incidental expenses and matters required under the proceedings described by this chapter." This is similar to a portion of section 46 of the Vrooman Act.[9] There is no requirement here, however, for approval of the award. There are several minor differences.

§ 916. **Assessment for the Work.**—Section 10 provides: "After such contract has been awarded and entered into, the board of public works shall proceed to assess the cost and expense of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the same according to the benefits it receives from the work. The board of public works in making such assessment shall also include therein the total amount for which each lot or tract is assessed for the damages resulting from the regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets, provided, no assessment for such damages and cost and the expense of such work shall be levied upon any property which will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment-book of the city and county." This is similar to section 47 of the Vrooman Act.[10] The limitation of the amount, however, is an addition.

§ 917. **Action of Supervisors on Assessment.**—Section 11 provides: "The secretary of the board of public works shall forward to the board of supervisors a certified copy of the report and assessment as finally adopted by the board of public works, whereupon such report and assessment shall be changed, modified or confirmed by the board of supervisors, and upon such modification, change or confirmation thereof, shall be returned to the board of public works and shall thereupon be the assessment-roll. Immediately upon

[9] See ante, sec. 376.
[10] See ante, sec. 378.

receipt thereof by the board of public works, the assessment therein contained shall become due and payable and shall be a lien upon all the property contained or described therein." This corresponds to section 48 of the Vrooman Act,[11] although the proceedings are slightly different.

§ 918. **Collection of the Assessment.**—Section 12 provides: "The board of public works shall thereupon give notice by publication for ten days in the official newspaper, that it has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums are to be made to the board of public works within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent; that thereafter the sum of five per cent upon the amount of said delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto. When payment of any assessment is made to said board of public works, the secretary thereof shall write the word 'paid' and the date of payment opposite the respective assessments so paid, and the name of the person by or for whom said assessment is paid, and shall give a receipt therefor. On the expiration of said thirty days all assessments then unpaid shall be and become delinquent and the secretary of said board of public works shall certify such fact at the foot of said assessment-roll and shall add five per cent to the amount of each assessment so delinquent. The said secretary of the board of public works shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent and the whole thereof, including the cost of advertising, which shall not exceed the sum of fifty cents for each lot, piece or parcel of land separately assessed, in the same manner as is or may be provided for the publication of the delinquent list of

[11] See ante, sec. 379.

state and county taxes; and after the date of said delinquency and before the time of such sale therein provided for, no assessments shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the cost of advertising already incurred, shall be paid therewith. Said list of delinquent assessments, with a notice of the time and place of sale of property affected thereby, shall be published daily for five days in the official newspaper, before the sale of property for such delinquent assessments. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of the secretary of the board of public works. All property sold shall be subject to redemption for one year and in the same manner as in sales for delinquent state and county taxes; and the secretary of the board of public works shall, if there be no redemption, make and deliver to the purchaser at such sale a deed conveying the property sold and may collect for each certificate fifty cents, and for each deed one dollar. The deed of the secretary of the board of public works, made for such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings thereunder, and that all title is in the grantee. The secretary of the board of public works shall, from time to time, pay over to the city treasurer all moneys collected by him, or by the board of public works, on account of such assessments, which the city treasurer shall, upon receipt thereof, place in a separate fund, designating each fund by the name of the street, avenue, square, lane, alley, court or place for the change of grade for which the assessment was made. And the city treasurer shall transfer to said fund such sum or sums as the supervisors may have ordered to be paid or advanced for or on account of such improvement out of that fund in the treasury of the city and county from which such appropriation is made. Payment shall be made from said fund to the parties entitled thereto, upon warrants issued by the secretary of the board of public works on order

of said board." This is similar to section 49 of the Vrooman Act.[12]

§ 919. **Payment of Damages.**—Section 13 provides: "When sufficient money is in the hands of the city treasurer to pay the total cost for damages, as well as the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the board of public works to notify the owner, possessor or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which may be received at the office of said board of public works. Such notification may be made by depositing a notice, postage paid, in the United States postoffice, at San Francisco, addressed to his last known place of residence. If, after the expiration of three days from the service or deposit of the notice in the postoffice, he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer to be delivered to him upon demand." This is similar to section 50 of the Vrooman Act.[13]

§ 920. **Payment to Contractor.**—Section 14 provides: "After the contractor to whom has been awarded the contract for regrading, repaving, sewering, sidewalking, curbing, or otherwise improving such street or streets, has fulfilled his contract to the satisfaction of the board of public works, and the city engineer has certified to the completion of said work, the secretary of the board of public works, on order of said board, shall issue a warrant, payable out of said fund, in favor of such contractor in payment for such work." This section is not contained in the Vrooman Act.

§ 921. **Procedure in Case of Deficiency.**—Section 15 provides: "In case of a deficiency of the fund to pay the whole assessed cost and damages, the board of supervisors may, in its discretion, order the balance thereof to be distributed by

[12] See ante, sec. 380 ff.
[13] See ante, sec. 383.

the board of public works, upon the property assessed, by a supplementary assessment, or direct the payment of such balance to be made from the city treasury; but in the event that a supplementary assessment is ordered, in order to avoid delay, the board of supervisors may advance such balance out of any available fund in the treasury and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation."

§ 922. **Right to Pay Cost Out of Treasury.**—Section 16 provides: "The board of supervisors may, in its discretion, order, by ordinance, that the whole or any part of the cost and expense of any of the work hereinbefore in this chapter mentioned or the damages resulting therefrom, be paid out of the treasury of the city and county from such fund as the board of supervisors may designate. Whenever a part of such cost or expense is so ordered to be paid before the making of an assessment therefor, the board of public works, in making up the assessment heretofore provided for such cost or expense, shall first deduct from the whole cost and expense such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expense proportionately upon the lots, parts of lots and lands in said assessment district, or liable to be assessed for such work, and in the manner hereinbefore provided."

CHAPTER III.

SANTA ROSA CHARTER.

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§ 923. In General.—The Santa Rosa charter contains a complete scheme for street improvement. It is based upon the Vrooman Act, but differs from it in a number of respects. Perhaps the chief differences are: (1) All assessments under the charter are levied by the front-foot method. (2) Under the charter the cost of work on street crossings and street intersections is paid by the city. (3) The right to protest is more closely limited under the charter. The charter also provides a scheme for acquiring property for street purposes, but provides for no special assessment.

§ 924. What is a Public Street.—Section 70 of the charter corresponds to section 1 of the Vrooman Act.[1] It provides: "All streets, sidewalks, lanes, alleys, places, courts,

[1] See ante, sec. 52 ff.

public squares or public parks now open or dedicated, or which may hereafter be opened or dedicated to public use, and all that have been used by the public for five years without interruption, shall be deemed and held to be open public streets, sidewalks, lanes, alleys, places, courts, public squares and public parks, and the council is authorized, empowered and has the right and jurisdiction to establish or change the grade of such streets, sidewalks, lanes, alleys, places, courts, public squares and public parks, and to fix the width and boundaries thereof, and to exercise full control over the same." The main difference between this and the corresponding section of the Vrooman Act is the provision that a street used for five years without interruption shall be considered an open public street. It is probable that this adds nothing to the provision of the Vrooman Act.

§ 925. **General Jurisdiction.**—Section 71 of the charter corresponds to section 2 of the Vrooman Act.[2] It is a statement of the general jurisdiction to do street work. It provides: "Whenever the public interest or convenience shall require, the council is authorized and has the power and jurisdiction to order the whole or any portion of the streets, sidewalks, lanes, avenues, alleys, courts, public squares, places or public parks to be graded, graveled or regraveled, planked or replanked, paved or repaved, macadamized or remacadamized, piled or repiled, capped or recapped, or otherwise improved; and to order sidewalks made, placed or constructed, manholes, culverts, cesspools, gutters, tunnels, curbing and crosswalks to be laid, repaired, or improved; or to order any other work to be done which shall be necessary to complete the improvement of the whole or any portion of said streets, avenues, sidewalks, lanes, alleys, courts, places, public squares or public parks."

§ 926. **Resolution of Intention.**—The first step in the proceedings is the passage of a resolution of intention. Sec-

[2] See ante, sec. 50 ff.

tion 72 provides: "Before ordering any of the work or improvement mentioned in section 71 of this charter the council shall pass a resolution of intention so to do, describing the work or improvements to be done." This is practically the same as the corresponding provision of section 3 of the Vrooman Act. What has been said as to the description of the work under the Vrooman Act is applicable here.[3] The resolution, it would seem, should state whether it is to be posted or published; and if it is to be published, it should designate the newspaper in which publication should be made.[4] A publication without designation, or in a newspaper other than that designated, would probably be of no avail.[5] In case part of the cost is to be paid out of the city treasury, the resolution should state what portion is to be so paid.[6]

§ 927. **Notice of Intention.**—The provision for notice of intention is quite different from the corresponding provision of the Vrooman Act. Section 72 provides that "a copy of said resolution, with the date of its passage, shall be posted in a conspicuous place on or near the front of the building in which the sessions of the council are held, or published for five days in a daily newspaper published in the city, and notices of a passage of said resolution signed by the street commissioner shall be posted conspicuously along the line of said proposed work at not more than one hundred feet in distance apart, and not less than three notices in all. Said notices shall be headed 'Notice of Street Work' in letters of not less than one inch in length and in legible characters, stating the fact of the passage of the resolution, date of passage, and briefly the work proposed to be done, and shall refer to the resolution for further particulars. Said notices shall be posted at least ten days." It is apparent that the resolution need not be both posted and published.

[3] See ante, sec. 64 ff.
[4] See ante, sec. 90.
[5] See ante, sec. 90.
[6] See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

In this respect, the charter follows a former provision of the Vrooman Act.[7] It would seem that the resolution of intention should state whether it is to be posted or published. The provision for posting notice along the line of the work is similar in most respects to the corresponding provision of the Vrooman Act.[8] What has been said as to that applies, in general, here.

§ 928. **Protests.**—The charter also differs from the Vrooman Act in that it provides for but one form of protest—a protest by the owners of two-thirds of the frontage. Section 72 provides: "The owners of two-thirds of the frontage of the property fronting on said proposed work, when the same is for one block or more, shall have twenty days from the first day of posting of said notice within which to make and file with the city clerk written objections to the proposed work or improvement. Upon receiving such written objections, the city clerk shall indorse thereon the date of their reception by him, and such objections shall be a bar for six months to any further proceedings in relation to the doing of said work, unless the owners of two-thirds or more of the frontage as aforesaid shall meanwhile petition for the same to be done. When not more than two blocks, including street crossings or intersections, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on one or both sides upon said street has been so graded or otherwise improved, said council may order such work or improvement mentioned to be done upon said ungraded or unimproved part of said street notwithstanding such objections, and said work shall not be stayed or prevented by any written objections, unless the council shall deem the same proper." The main differences between this and the provision for a majority protest under the Vrooman Act are: (1) The charter requires a two-thirds' protest instead of a majority. (2) The charter makes but

[7] See ante, sec. 89, note.
[8] See ante, sec. 95.

two exceptions to the force of a two-thirds' protest. In the main, the rules applicable to the majority protest under the Vrooman Act are applicable here.[9]

§ 929. **Resolution Ordering Work.**—Section 72 further provides: "At the expiration of the said twenty days, if no written objections by the owners of two-thirds of the frontage to the work of improvement in said resolution proposed to be done has been delivered to the city clerk as aforesaid, or if any written objections signed or purporting to be signed by the owners of two-thirds of the frontage is disallowed by said council, as not of itself barring said work, the council shall be deemed to have acquired jurisdiction to order any of the said work to be done, and all persons in interest shall be deemed to have had full notice and full opportunity to be heard, and shall be concluded from further hearing or objections. Before passing any order or resolution for the construction, making or doing of said work, plans and specifications and estimates of the costs and expenses thereof shall be furnished by the city engineer." In the main, the rules relating to the resolution ordering the work under the Vrooman Act are applicable here.[10] It is to be noted that there is no express provision for a hearing, even in cases where a protest is disallowed. The provision for plans and estimates differs from the corresponding provision of the Vrooman Act. Under the charter, it would seem that they must be furnished in all cases before the resolution ordering the work is passed.

§ 930. **Payment of Portion by City.**—Section 73 provides: "If in the opinion of the council the public necessity requires any of the work mentioned in section 71 of this charter to be done, and that it is of more than local or ordinary benefit, the council shall have power and jurisdiction in such case to order such work to be done, and to pay a

[9] See ante, sec. 99 ff.

[10] See ante, sec. 129 ff.

portion or all of the costs and expenses thereof out of any available funds in the city treasury; but the council shall have power to apportion the whole of the costs and expenses of such work or improvement against the owners of property fronting on the line of such work or improvement according to the frontage of lots or land owned by each respectively. And if a portion is paid out of the city treasury the remainder of such costs and expenses shall be apportioned to and charged against the owners of property fronting on the line of said work or improvements authorized in this section, according to the frontage of lots or land owned by each respectively. If a portion or all of the costs and expenses of the work is to be apportioned and collected from the owners of the lots or land fronting on such improvement, the council shall comply with all of the provisions of section 72 of this charter in relation to the passage of a resolution of intention, posting of notices, filing of written objections, giving notices of hearing, making the order, and the acts and things required in said section to be done shall be done and performed in the same manner as is required when the whole of the costs and expenses of the said work is to be paid by the owners of property fronting on the line of the work." In general, this corresponds to section 26 of the Vrooman Act. The resolution of intention should state what proportion is to be paid by the city.[11]

§ 931. **Petition for the Work.**—Section 74 provides: "The owners of two-thirds of the frontage of lots and lands fronting on any street, sidewalk, avenue, lane, alley, place or court, or of lots of land liable to be assessed for the costs and expenses of the work which may be ordered, or their duly authorized agents, may petition the council to order any of the work mentioned in this charter to be done, and the council may order the work mentioned in this charter to be done; in which case the council shall proceed under

[11] See Southwick v. City of Santa Barbara, 158 Cal. 14, 109 Pac. 610.

section 72 of this charter, and all of the provisions of said section 72 shall be complied with the same as though no petition for said work had been filed." In a general way, this corresponds to section 4 of the Vrooman Act.[12] This particular section, however, is almost meaningless. The right to petition is well established. The council may commence proceedings of its own initiative, or upon the request of anyone. The provisions of section 72 must be followed in any event. The only use of a petition is to overcome a prior protest; and such a petition is authorized by section 72.

§ 932. **Rules of Assessment.**—Section 75 provides: "When all of the costs and expenses, or a portion thereof, for the work in this charter provided is for work done upon any street, lane, alley, or sidewalk, and the same is to be apportioned and charged against the owners of property fronting on such work, such costs and expenses shall be apportioned to, charged against and collected from the owners of the property fronting upon the line of the work ordered to be done, and such owners shall be liable for such costs and expenses for all of the work embraced in the resolution or order, and such costs and expenses shall be apportioned against and collected from the owners of property fronting on the line of said work. In all cases of apportioning the costs and expenses against the owners of property, it shall be according to the number of front feet owned by each respectively. The costs of such work on street crossings or street intersections shall be paid by the city." This adopts the front-foot method of assessment as the sole method. The validity of such a mode has been frequently decided.[13] The provision that the cost of work on street crossings and intersections shall be paid by the city renders unnecessary the elaborate provisions of section 7 of the Vrooman Act.

[12] See ante, sec. 115 ff.
[13] See ante, secs. 6–13.

§ 933. **Same—Where Work is Done Only on One Side of Street.**—Section 75 must be read in connection with section 79, which provides: "Where the work done is the building, making or laying of sidewalk and curbing thereto on one side only of the street, or is work done on one side of the center line of a street, lane or alley, the lots and land fronting on that side on which the work is done only shall be assessed."[14]

§ 934. **Award of Contract—Property Owners' Contract.** The provisions for the award of contract, and for a property owners' contract, are quite similar to the provisions of section 6 of the Vrooman Act.[15]

Section 76 provides:

"Before ordering any contract to be let for any work provided for in this charter the street commissioner shall cause specifications to be made, one copy to be kept by the city clerk in his office for the inspection of bidders, and cause a copy and a notice to bidders to be posted conspicuously for five days on or near the front of the building in which the sessions of the council are held, inviting sealed bids for doing the work, and shall also cause a like notice to be posted up in at least two other public places in said city, and referring to the specifications posted or on file with the city clerk. All bids offered shall be accompanied by a check payable to the order of the mayor, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the bid. Said bid shall be delivered to the city clerk, and the council shall, in open session, examine and publicly declare the same. The council may reject any and all bids, and shall have the right to select the lowest responsible bid and to award the contract to the bidder thereof. The checks accompanying all bids not accepted shall be returned to the bidders who gave them; but the checks accompanying the

[14] See ante, secs. 197, 198.

[15] See ante, sec. 134 ff.

accepted bid shall be held by said clerk until the contract for doing said work has been duly entered into and the bond required shall be given and accepted by the mayor, or until the owners of a majority of the frontage on said work shall elect to take the contract at the same bid, which they may do in five days after the bid has been announced; but if the bidder fails, neglects or refuses to enter into contract to perform said work for three days after the expiration of the five days allowed to property owners to take the bid, then the said check accompanying his bid and the amount therein mentioned shall be declared forfeited to and become the property of the city.

"The owners of a majority of the frontage of lots and land upon the line of said proposed work may, within five days from the declaring of the bid, elect to take said work and to enter into a written contract to do the whole work at the same bid, but should they fail to enter into a contract within the five days allowed for that purpose, then the successful bidder shall within three days thereafter enter into a contract with the city to do the work, and at the price specified in his bid. But should such successful bidder fail or neglect to enter into such contract in the time limited, the council shall have the right to declare the bid off, and the certified check and the money thereunder shall be forfeited to and become the property of the city and shall be paid into the treasury, and the council shall again give notice for bids for said work as in the first instance, and shall award the contract to the then lowest responsible bidder. At the time of executing any contract for work as herein provided, each contractor shall execute a bond to the satisfaction of the mayor, with two or more sureties, payable to the city, in such sums as the council shall deem adequate, conditioned for the faithful performance of the contract. The mayor is hereby authorized, in his official capacity, to take and receive all written contracts and bonds authorized under this charter and to do and perform any act required in relation thereto."

The main differences between this and section 6 of the Vrooman Act are: (1) Under the charter, specifications are to be made under the direction of the street commissioner, and there is no provision for their adoption by the council. (2) No publication of notice calling for bids is required by the charter, but additional posting is necessary. (3) No approval of the award is necessary under the charter. (4) No notice of award is necessary under the charter. (5) The owners of a majority of the frontage may take the work under the charter; under the Vrooman Act, this right is given only to the owners of three-fourths of the frontage. (6) The times for property owners' election and for entering into the contract differ. (7) There is no provision in the charter compelling property owners to commence work within any special time.

§ 935. **Right of City to Do the Work.**—The charter confers upon the city the right to do the work without contract. Section 77 provides: "In case the council is not satisfied with any bid or bids that may have been made for the construction and performing of the work it may, in case the owners of the majority of the frontage of lots and land do not elect to take said work and to enter into a written contract to do the whole thereof at a price agreeable to the council, that then the said council shall have the right to elect to do the work in the name of and for the city, and if for any reason the council is of the opinion that better work will be done and better material furnished and that it will be for the best interests of the city to have the work done in the name of and by the city, that then the council shall have the right, and it shall be its duty to do and perform such work and pay therefor out of the proper funds of the city, and the city shall have a lien upon all property fronting upon said street or streets, sidewalks or alleys where the said work shall be done, and the same shall be apportioned as in section 75 set forth, and the same shall be collected in such manner as the council shall direct."

§ 936. **General Regulations.**—Section 78 provides: "The street commissioner shall superintend any work herein authorized to be done which shall be commenced and prosecuted with diligence until completed, and the council may, for good cause, extend the time. The work must be done under the direction and to the satisfaction of the street commissioner. The materials used and the work done must comply with the specifications and to the satisfaction of the street commissioner. Neither the city nor any officer thereof shall be liable for any portion of the costs or expenses of the work, nor for the delinquency of persons or property assessed or liable therefor, except as provided in sections 73, 75 and 77 of this charter. The council may by ordinance prescribe the materials to be used and the mode of executing the work under all contracts in relation thereto. The assessment and apportionment of the costs and expenses of all such work shall be made by the street commissioner." These are general regulations which follow similar statements in the Vrooman Act.[16]

§ 937. **Right to Do Work by Private Contract.**—Section 80 provides: "When the width and grade of any street and sidewalk has been established the owner or owners of property thereon may, by permission of the council and under the supervision of the street commissioner, do the work of grading, graveling, macadamizing, paving or improving such street, and may grade such street to the established grade and gravel, macadamize, pave and put the same in order, and may make, lay and build sidewalks in front of their said property, if done to the satisfaction of the street commissioner, and in conformity to existing ordinances, rules and regulations and plans approved by the council. The expense of such work in this section mentioned shall be borne by such owners of property according to frontage." The right of owners to do work by private contract is considered in a later chapter. It would seem that the

[16] See ante, sec. 160 ff.

only effect of this provision is to require such owners to obtain a permit before doing the work. The last sentence of the section is at least of doubtful effect. Where work is done under a private contract, owners generally are entitled to make the best terms possible. I doubt if it is within the power of the legislature to say that a private contract for such work must apportion the expense in any particular way.

§ 938. **The Assessment and Enforcement Thereof.**— The provisions for the making of the assessment and the enforcement thereof are somewhat similar to the provisions of the Vrooman Act.[17]

Section 81 provides: "After the completion of any work done under contract as in this charter provided, and where the owners of property fronting on the line of the work are to pay or be charged with the costs and expenses of the whole or a portion thereof the street commissioner shall make an assessment to cover the sum due for the work performed, including incidental and other expenses. Such assessment shall briefly refer to the contract, the work performed thereunder, the rate per front foot, the amount of each assessment and the amount each owner must pay and the name of the owner of each lot, if known; if not known, the word 'Unknown' shall be written opposite to the number of the lot and the amount given thereon, the lot or portion of a lot and the front feet of each owner so far as can be ascertained, and the total number of front feet fronting upon the work, and liable for the assessment. The assessment shall have a diagram attached showing the location of the lots, the frontage of each owner, the street, cross streets and the number of feet assessed for said work. The said assessment shall have attached thereto a warrant signed by the street commissioner and may be substantially in the following form: 'By virtue hereof, I (name), street commissioner of the city of Santa Rosa, county of Sonoma, state

17 See ante, sec. 203 ff.

of California, do authorize and empower (name of contractor), or his assigns, to demand and receive the several assessments upon the assessment-roll and diagram hereto attached, and this shall be his (or their) warrant for the same. (Date and signature).' The assessment diagram and warrant attached shall be recorded in the office of the city clerk, and shall be a lien upon the lots of land assessed respectively for one year from its date, and from and after the same shall be recorded all persons shall be deemed to have notice of its contents. If payment shall be made after such recording, satisfaction may be entered on the record thereof and the lien discharged. The lien, in any case, shall have no force or validity whatever after the expiration of said one year unless suit to forclose the same shall have been commenced thereon within that time. At any time after the period of thirty days from the date of the warrant the contractor or his assigns may sue in his own name and foreclose the lien against the owner or persons having any interest in the lots or portions of lots of land assessed, and recover the amount of the assessment remaining unpaid, interest and costs, and also the sum of fifteen dollars as attorney's fees for foreclosing such lien. Such suit may be brought in the Superior Court of the county of Sonoma, state of California, and summons shall issue and be served in the manner required in other cases. Said warrant, assessment, and diagram shall be prima facie evidence of the regularity and correctness of the assessment and the correctness of all of the proceedings, and of all of the acts, resolutions and orders of the council, and like evidence of the right of the plaintiff to recover in the action, and the said court shall have power to adjudge and decree a lien upon the lots of land and premises for the whole amount due from each lot owner, and to order the same to be sold on execution, as in other cases of the sale of real estate by the process of the court. Such sales shall be conducted in all respects in the same manner, as near as may be, and with like effect, as sales on execution, and the sections of the Code

of Civil Procedure of the state of California in relation to sales on execution, certificates of sale, redemption deeds, and all other proceedings thereon, are made applicable hereunder. Such premises, if sold, may be redeemed as is provided by law in other cases. The Code of Civil Procedure of California governing appeals to the Supreme Court in civil cases shall apply to such cases. All provisions of this charter regulating street work shall be liberally construed, and all presumptions shall be indulged in favor of upholding the proceedings. If the work has been done substantially as required by the contract, no irregularity, error or mistake in any of the proceedings, or any disregard, violation of or failure to comply with any of the requirements of this charter, or of any law or ordinance of the city, shall be a defense to the action to foreclose any lien provided for in this charter, or to any action to recover the amount of the assessment."

The chief differences between the charter provisions and the Vrooman Act are: (1) The lien, under the charter, lasts for one year instead of two. (2) No certificate need be recorded. (3) There is no provision in the charter for a reassessment in case the first is invalid. (4) No demand is required by the charter. (5) No provision for an appeal to the council is made by the charter.

§ 939. **Power to Adopt Other Procedure for Collection.**— Section 85 provides: "The council may by ordinance provide any other or different procedure for the collection of the amounts due under the assessment for work done under this charter." It is to be noted that the other procedure is only for the collection of the assessment. This does not authorize the enacting of an independent procedure for ordering the work.

§ 940. **Eminent Domain — Preliminary Proceedings.** — Section 66 provides: "Whenever a petition praying for the establishing, laying out, extending, widening, altering or opening of any street, lane, road, sidewalk, public square

or public park, or for acquiring land therefor, or for acquiring any water system, plant, land, water, water rights, rights of way, pipes, conduits and any and all easements, rights, privileges or appurtenances, or for acquiring any electric or gas plants, land, buildings, grounds, poles, pipes, wires, easements, and any and all rights of way, privileges or appurtenances for the supplying or furnishing additional water or water plant, or electric light plant, or lights either of gas or electricity for said city or the inhabitants thereof, or for putting in, establishing, erecting or carrying on any electric or gas works for the purpose of lighting said city, or furnishing the inhabitants thereof with gas or electricity, or for exercising the right of eminent domain for any other purpose or use, signed by twenty-five or more resident citizens of said city, shall be presented to the council, it shall be read in council, and the hearing thereof set for the next regular meeting of the council, and all owners and claimants of the property affected by the said proceedings shall be given five days notice of the pendency of such proceeding and of the time and place of the said hearing of the same, and at the time fixed for the hearing of said petition, or to which the hearing thereof may be adjourned, the said petition and any and all protests, if any, shall be read, considered and acted on in open session; and if the council shall deem the proposed establishing, laying out, extending, widening, altering, or opening of the street, lane, alley, road, sidewalk, public square, or public park, or for acquiring land therefor, or for acquiring any water system, plant, land, water, water rights, rights of way, pipes, conduits and any and all easements, rights, privileges, or appurtenances, or for acquiring any electric or gas plants, land, buildings, grounds, poles, pipes, wires, easements, and any and all rights of way, privileges or appurtenances, for the supplying or furnishing additional water, or a water plant or lights, electric light plant, or lights either of gas or electricity for the city or the inhabitants thereof, or for exercising the right of eminent domain for any other purpose or use,

prayed for in the petition, to be a public necessity, they shall so declare by resolution entered upon their minutes, and shall order a survey to be made by a competent person, who shall make a survey and diagram of the same and report it to the council. The diagram and survey shall show the location and description of the particular rights, privileges or property which it is proposed to acquire for any of the purposes herein stated, and the land or property of each owner affected thereby, and the boundaries of the land and a general description of the property proposed to be taken."

§ 941. **Same—Notice to Owners.**—Section 67 provides: "Upon filing said survey and diagram the city clerk shall issue a notice directed generally to all persons interested, setting forth that such petition has been filed, and the action of the council thereon, and that the survey and diagram has been made and filed, and that the same were in his office, open to the inspection of all persons interested and that proceedings would be instituted against nonconsenting property owners for the condemnation of the property required for public purposes or public use. Said notices shall be served on the nonconsenting property owners and may be served by any competent person above the age of twenty-one years by delivering a copy thereof to the person to be served, or by posting the same in a conspicuous place on the land of such nonconsenting property owner, and by publishing the same in a daily newspaper published in the city for five days. If any such owner shall not, within ten days after such service of said notice, either donate, sell or relinquish such land to the city for the purposes proposed, proceedings for condemnation shall be commenced in the name of the city in the court having jurisdiction."

§ 942. **Same—Parties.**—Section 68 provides: "Any and all occupants and owners, or persons having any interest in the land sought to be condemned, may be joined as parties in the suit; and one action shall be sufficient against all

persons owning, claiming or having any interest in the land or property sought to be taken."

§ 943. **Same—Evidence.**—Section 69 provides: "The record of the passage of the resolution of the council declaring the work a public necessity for public use, or if the land or property sought to be taken is already a public use or quasi-public use that the purpose for which it is sought to be taken is of higher and greater public use, and that the taking of the land for the purposes, as herein provided, is a public use and is necessary, or that the taking thereof in such proceeding is of a higher and greater public use than that for which it is being used, shall be conclusive of the fact, and it shall also be conclusive that the petition was in due form and had been signed by the requisite petitioners; and it shall be prima facie evidence that the notices were in due form, and were served in all respects as required by law, and that the acts and things required to be done up to the passing of the resolution or making the order had been done in all respects as required by law. The right and jurisdiction to take and acquire any property rights as herein stated shall extend to and cover any such property rights, whether within or without the corporate limits of the city."

CHAPTER IV.

VALLEJO CHARTER.

§ 944. In general.
§ 945. Comparison of Vallejo and San Francisco charters.
§ 946. Provision for report by board of public works.
§ 947. Provision for protests.
§ 948. Provision for repairs.
§ 949. Urgent repairs.
§ 950. Right to proceed under Bond Act.
§ 951. Procedure for closing streets.
§ 952. Change of grade.

§ 944. In General.—The charter of Vallejo has, by an amendment of 1907, adopted, almost word for word, the street improvement procedure of the San Francisco charter. In fact, so closely are some parts of it copied that even errors in the latter charter are included in the former;[1] and in some places references to sections by numbers are copied without changing the numbers to make them apply to the Vallejo charter.[2] The charter provisions will be found in full in the Appendix. Here I shall merely point out the few points of difference between the two charters.[3] There is no provision authorizing the city, at its option, to use all of the general street laws; but in certain cases, work may be done under the Bond Act.[4]

§ 945. Comparison of Vallejo and San Francisco Charters.—Except for slight changes in wording, such as the substitution of "trustees" for "supervisors," sections 220, 222, 224, 225, 226, 228, 229 to 234, inclusive, and 236 to 244, inclusive, are the same respectively as sections 1, 3, 5, 6, 7,

1 Thus, section 234 of the Vallejo charter copies the contradictory words "less than within thirty days" from section 15 of chapter 2 of article VI of the San Francisco Charter.

2 See Vallejo Charter, sec. 228, subds. 2 and 11.

3 For the San Francisco charter, see ante, sec. 838 ff.

4 See Charter, sec. 205.

9, 10 to 15, inclusive, and 17 to 25, inclusive, of chapter 2 of article VI of the San Francisco charter. Section 227 of the Vallejo charter is practically the same as section 8 of chapter 2 of article VI of the San Francisco charter, except that the proviso contained in the latter as to sewers is omitted in the former. Section 245 of the Vallejo charter is practically the same as section 26 of chapter 2 of article VI of the San Francisco charter, except that the latter provides for publication in the official newspaper, while the former does not. Sections 221, 223 and 234 of the Vallejo charter are somewhat different from the corresponding provisions of the San Francisco charter, and will be treated separately.

§ 946. **Provision for Report by Board of Public Works.**—Section 221 of the Vallejo charter provides:

"Application for the doing of any such work or improvement must in the first instance, except where otherwise provided in this article, be made in writing to the board of public works; and if the expense thereof is to be assessed upon private property, the board shall investigate the same; and if it determine that such improvement is expedient, it shall so report to the trustees; and the trustees shall not order any such improvement until the same has been recommended by said board. When the construction of any sewer or drain shall involve a cost of more than five dollars per lineal foot for any block, it shall not be authorized except by an ordinance passed by the affirmative vote of not less than four-fifths of the members of the board of trustees. If an application is made for any work or improvement of which the expense is to be paid by the city, and the board of public works shall not approve of such application, it shall report to the trustees its reasons for such disapproval, and the trustees may then, after having obtained from the board of public works an estimate of the expense of said work or improvement, by ordinance passed by the affirmative vote of not less than four-fifths of the members of the board

of trustees, order the doing of said work, or the making of said improvement.

"The board of public works may also, except as herein prohibited, recommend any improvement, the expense of which is to be paid by the city, though no application may have been made therefor, and must make, with such recommendation to the trustees, an estimate of the expense, and in such case the trustees may order the same done.

"No street work or street improvements of any kind shall be ordered to be done by the trustees unless a written recommendation to do the same has been made to them by the board of public works, and all such recommendations shall be made matters of record in the office of the said board.

"When the board shall recommend any work to be done on a street intersection or crossing, where the streets do not intersect each other at right angles, it shall in each such case determine what lots in the blocks adjacent to such intersection or crossing will be benefited by said work and shall cause a map to be made on which shall be delineated the lots so to be benefited. Such map shall be transmitted to the trustees with said recommendation."

The foregoing is very similar to section 2 of chapter 2 of article VI of the San Francisco charter.[5] The main differences are: (1) The Vallejo charter omits the provisions as to who may make the application and as to the contents of the application. (2) It omits an express statement of the right of the board to modify the application. (3) It provides for a four-fifths vote in certain cases, instead of a vote of fourteen supervisors. (4) It omits the exception contained in the San Francisco charter, which makes an application unnecessary in certain cases.

§ 947. **Provision for Protests.**—Section 223 provides: "The owners of a majority of the frontage of the property fronting on said proposed work or improvement, and in the case of a district, those owning more than one-half of the

[5] See ante, sec. 841.

superficial area of the district, may make written objections to the same within ten days after the expiration of the time of the publication of said resolution of intention, which objections shall be delivered to the secretary of the board of public works, who shall indorse thereon the date of its reception by him. Such objections shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the one-half or more of the frontage or of the district, as aforesaid, shall meanwhile petition for the same to be done, and the same shall, after the expiration of said six months, be continued under the resolution of intention first passed if said board shall deem proper.

"If, however, the owners of at least two-thirds of the property fronting on said proposed work or improvement, and, in the case of a district, those owning at least two-thirds of the superficial area of the district, shall make written objections to the same within said six months, no further proceedings shall be taken under the aforesaid resolution of intention.

"When the work or improvement proposed to be done is the construction of sewers, manholes, culverts or cesspools, and the objections thereto are signed by the owners of a majority of the frontage or of the district as aforesaid, the board shall at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The secretary shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice at the city, postage prepaid, and addressed to each objector or his agent when he appears for such objector. At the time specified the board shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive; and if said objections are overruled the proceedings shall be continued as though no objections had been made.

"At any time before the making of the assessment as hereinafter provided, all owners of lots of land liable to assessment therein, who, after the first publication of the

aforesaid resolution of intention, may feel aggrieved, or who may have objections to any proceedings in relation to the performance of the work described in said resolution, may file with the secretary a petition of remonstrance, wherein they shall state in what respect they feel aggrieved or the proceedings to which they object. Such petition or remonstrance shall be passed upon by the board, and its decision thereon shall be final and conclusive."

This is similar to section 4 of chapter 2 of article VI of the San Francisco charter. The chief differences are that the Vallejo charter makes fewer exceptions to the operation of protests, and that it does not dispense with the application in any case.

§ 948. **Provision for Repairs.**—Section 235 provides: "When any portion of the roadway of any street, avenue, lane, alley, court, or place, or any portion of any sidewalk in the city, none of which has been accepted by the trustees as in this article provided, shall be so out of repair as to endanger persons or property passing thereon, or so as to interfere with the public convenience in the use thereof, the board of public works shall require the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court or place, by a notice in writing, to be delivered to them or their agents personally, to repair forthwith said portion of said street, avenue, lane, alley, court or place, to the center line thereof, in front of the property of which he is the owner or tenant, or occupant. The board shall particularly specify in said notice what work is required to be done and what material shall be used in said repairs. If said repairs be not begun within five days after notice given as aforesaid and diligently and without interruption prosecuted to completion, the board may make such repairs, or enter into contract with any suitable person, at the expense of the owner, tenant, or occupant, after the specifications for the doing of said work shall have been conspicuously posted by it in its office for three days,

inviting bids for the doing of said work. Said bids shall be delivered to it at its office on or before the second day after the completion of said posting, and opened by it on the next day following, whereupon the contract shall be awarded to the lowest responsible bidder.

"All of said bids shall be preserved in the office of the board, and shall be open at all times after the letting of the contract, to the inspection of all persons; and such owner, tenant, or occupant shall be liable to pay said contract price. Such work shall be commenced within twenty-four hours after the contract shall have been signed, and completed without delay to the satisfaction of the board. Upon the completion of such repairs by the contractor as aforesaid to the satisfaction of the board, it shall make and deliver to the contractor a certificate to the effect that such repairs have been properly made by said contractor to the grade, and that the charges for the same are reasonable and just, and that the board of public works has accepted the same."

This is practically identical with section 16 of chapter 2 of article VI of the San Francisco charter, prior to the amendment thereof in 1910. It is similar to section 13 of the Vrooman Act, which has been discussed in another chapter.[6]

§ 949. **Urgent Repairs.**—Section 202 provides:

"Said commissioners shall cause to be made all urgent repairs upon accepted streets, that may from time to time be requisite for public safety, and for that purpose may employ such laborers as may be necessary, and at such wages as is in this charter provided; but when the cost and expense of such repairs upon any accepted street, or portion of a street shall exceed the sum of two hundred dollars, exclusive of material to be furnished from the corporation material yard, if there be any such material on hand, the same shall be done under contract, awarded in the manner provided in this charter.

[6] See ante, sec. 317 ff.

"All work required to be done on any street, or part of any street, in said city which has not been accepted, shall be done at the expense of the owners of the property fronting on said street, or part of said street, and in the manner provided in this article; provided, that the board of trustees may provide for such repairs on unaccepted streets as the commissioners of public works may recommend as necessary to public safety; provided, also, that no greater sum than five hundred dollars shall be expended for that purpose in any one year."

§ 950. **Right to Proceed Under Bond Act.**—Section 205 provides:

"Whenever the board of trustees shall find, upon the estimates of the commissioners of public works, that the cost of any proposed work or improvement authorized by this charter will be greater than one dollar per front foot along each line of street so proposed to be improved, including the cost of intersection work assessable on said frontage, it shall have the power, in its discretion, to determine that serial bonds shall be issued to represent the cost of said work or improvement; said bonds to be issued, and the work to be done, in accordance with the provisions of an act of the legislature of the state of California, entitled 'An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds,' approved February 27, 1893.

"Said serial bonds shall extend over a period not exceeding ten years from their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January of every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year, at the rate of not to exceed seven per cent per annum, on all sums unpaid, until the whole of said principal and interest are paid. Said

bonds and interest thereon shall be paid at the office of the city treasurer, who shall keep a fund designated by the name of said bonds, into which he shall receive all moneys paid him for the principal of said bonds and the interest thereon, and from which he shall disburse such sums upon presentation of said coupons; and under no circumstances shall the said bonds or the interest thereon be paid out of any other fund. Said treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee, and indorser of each bond, and the number and amount of each coupon of principal or interest paid by him, and shall cancel and file each coupon paid."

The Bond Act is discussed in detail in another chapter.[7]

§ 951. **Procedure for Closing Streets.**—Section 246 provides: "When the owners of all the lands fronting upon any street which is less than sixty feet in width, for the entire distance of said street, or for the distance of one or more entire blocks, shall petition the board of public works that the said street or that portion thereof upon which said lands front, be closed, the board may pass a resolution recommending that the same be closed. Before passing such resolution the board shall cause a notice of the application to be published in a newspaper, in said city, and shall fix a time and place at which it will consider the same and hear objections thereto. Upon such hearing it shall determine whether it will recommend that the street be closed; and if it shall so determine, it shall transmit such recommendation to the trustees. Thereupon the trustees may pass an ordinance that the street be closed; and the same shall not thereafter be, or be deemed to be, a public street, or subject to any public expense or improvement; and the land theretofore included within the roadway and sidewalks of said street shall thereafter be the property of the city. No such ordinance shall be passed until the petitioners shall have paid all the expenses of said proceedings." This fails to

[7] See ante, sec. 386 ff.

make any compensation to owners damaged; and, as we have already seen, a street cannot be closed without such compensation, when any owner damaged objects.[8] The provision that the land shall belong to the city upon the closing of the street is clearly invalid so far as it attempts to transfer title in fee to the city. A city cannot take property in any such way.

§ 952. **Change of Grade.**—Section 200 provides: "When any street shall have been graded, paved or otherwise improved in accordance with the terms of this charter, and the costs of said improvements shall have been paid by the owners of the lots or lands adjacent thereto, and such grading, paving, or other improvements shall have been accepted and established, no change shall be made in the grade of such street, unless on the petition of the owners of three-fourths of the property fronting on said street. Upon the filing of said petition with the city clerk, the board of trustees shall refer the same to the commissioners of public works, which shall determine whether the improvement described would be a public benefit, and shall report their decision to the board of trustees. If the report of said board should favor granting the request of the petitioners, the board of trustees shall proceed in the manner elsewhere in this charter provided."

[8] See ante, secs. 671, 672.

CHAPTER V.

CITIES INCORPORATED UNDER SPECIAL ACTS.

§ 953. Alviso.
§ 954. Marysville.
§ 955. Santa Clara—Street improvements—Section 14.
§ 956. Same—Same—Section 15.
§ 957. Same—Same—Street crossings—Other expenses.
§ 958. Same—Same—Other provisions.
§ 959. Same—Street opening.
§ 960. Gilroy.
§ 961. Nevada City.

§ 953. **Alviso.**—The town of Alviso was incorporated by special act of the legislature in 1852.[1] Section 1 of the incorporating act provides that the town is incorporated "under the provisions of an act entitled 'An act to provide for the incorporation of towns,' approved March twenty-seventh, eighteen hundred and fifty, subject to the changes hereby expressly made."[2] The act referred to confers general authority to lay out, alter, keep open, and repair the streets and alleys of the town, but prescribes no procedure.[3]

§ 954. **Marysville.**—Marysville is incorporated under a special act of the legislature adopted in 1876.[4] Section 1 of the act provides that the municipal corporation shall have the powers and be subject to the provisions of Title III of the Political Code. Section 4408 of the Political Code authorizes cities to lay out, extend, alter or widen streets and alleys. Section 4409 of the same code provides: "Whenever the owners of a major part of the property fronting on any street or avenue desire to improve such street by paving the same, or constructing sewers, or otherwise, the mayor and council may make such improvement at the ex-

1 Stats. 1852, p. 222. See provisions in Appendix, post.
2 Stats. 1850, p. 128.
3 Sec. 6.
4 Stats. 1876, p. 149.

pense of all the owners of property on the street, which expense must be in proportion to the number of feet owned by each."

§ 955. **Santa Clara—Street Improvements—Section 14.**—Santa Clara is incorporated under a special act of the legislature, which contains a full procedure for street improvement and for street opening.[5] In brief, the procedure for street improvement, as contained in sections 13 to 18, inclusive, are as follows: (1) The board of trustees must pass a resolution of intention, describing the work to be done. This should be in substantially the form and contain the matters required by the resolution of intention under the Vrooman Act.[6] (2) The resolution, signed by the town clerk, must be published for two weeks in a newspaper designated by the board. While there is no express provision for such a designation, it would seem, under the principles we have considered in an earlier chapter, to be necessary. (3) Owners who feel aggrieved or who object to subsequent proceedings may file a remonstrance, wherein they shall state in what respect they feel aggrieved, and their reasons for objecting to the proceedings. There is no provision as to when this may be filed, nor is there any express provision for a hearing. The statute provides, however, that the decision of the board thereon shall be final and conclusive. (4) A majority protest may be filed. This suspends the proceedings for six months, unless the owners sooner petition for the work. Where, however, it shall "come to the knowledge of the board of trustees that said improvements, or any portion of them, are an immediate public necessity, they shall then proceed in reference to said proposed work or improvements, or so much thereof as they may deem and declare to be necessary, as if no remonstrance had been made." The effect of this is to enable the board to overcome a majority protest by merely declaring the work

[5] See Stats. 1871–72, p. 251. See charter provisions in the Appendix, post.

[6] See ante, sec. 64 ff.

an immediate public necessity. There is no provision as to when the protest must be filed. Jurisdiction to order the work accrues upon the expiration of the period of the publication of the notice of intention. The foregoing matters are all provided for in section 14.

§ 956. **Same—Same—Section 15.**—(5) Thereafter the board of trustees must cause a survey of the proposed work to be made by a surveyor, who must produce a map and diagram indicating the proposed grade and the amount of excavating and filling in front of each person's land, to the middle of the street. (6) If the board of trustees approve the survey, diagram and specifications, the same must be placed on file in the office of the town clerk, and thereupon the board of trustees must pass a resolution ordering the work to be done. This resolution should correspond in general with the resolution ordering the work under the Vrooman Act. (7) The resolution ordering the work must be published at least three consecutive weeks in such manner as the board of trustees may direct. This requires a designation of the newspaper in which it is to be published. (8) At the expiration of the time of such notice the board of trustees may determine by ordinance or resolution at what time work shall be commenced and within what time it shall be completed. (9) Thereupon the owners of property fronting upon the improvement may do the work in front of their own property to the center line of the street.[7] The work must be done in accordance with the specifications and must be completed within the time fixed by the resolution of the board of trustees, or within an extension of that time. (10) If the work is not done within the time fixed, or within any extension which may be granted by the board of trustees, the board of trustees must pass a resolution directing the town marshal to let a contract for doing the balance of the work. The manner of awarding the contract must be stated in the resolution. (11) Upon completion of the work

[7] See Nicolson Pavement Co. v. Painter, 35 Cal. 699.

and its acceptance by the surveyor and town marshal, the board of trustees must direct the town clerk to make an assessment, "apportioned to each of the persons or occupants owning or occupying said real estate." The assessment constitutes a lien upon the real estate. The assessment is to be equalized and collected in the same manner as town taxes. This provision provides adequate notice for property owners. The foregoing are contained in section 15 of the act.

§ 957. **Same—Same—Street Crossings—Other Expenses.** Section 16 provides: "The cost of the survey, specifications, maps, or diagram of any of the work or improvements hereinbefore mentioned, together with all culverts and street crossings, shall be paid by the town."

§ 958. **Same—Same—Other Provisions.**—Section 17 contains a scheme for making repairs at the expense of property owners. In general, it is similar to the procedure prescribed by section 13 of the Vrooman Act.[8] Section 18 provides that neither the town nor any officer thereof shall be liable for any portion of the expense, until after all claims on property owners have been paid or prosecuted to final collection. If sufficient is not received from such sources, the contractor may present a claim "to the board of trustees and be allowed and paid therefor from the general fund of said town."

§ 959. **Same—Street Opening.**—The act, in sections 32 to 36, inclusive, prescribes a procedure for street opening. In brief, it is as follows: (1) A petition praying for the work must be filed with the town clerk. (2) Thereupon, if deemed proper, the board of trustees must direct, by ordinance, some surveyor to make a survey of the proposed work, within such time as may be fixed. (3) The surveyor must file a survey and report, accompanied by a diagram map "showing the location of such proposed street, lane,

[8] See ante, sec. 317 ff.

or alley, and the width thereof; also, the boundaries of the lands of each owner through which such street, lane, or alley is proposed to be located, widened, extended, altered, or vacated." (4) Thereafter, at the next meeting, the board shall fix a time for hearing and assessment of damages, which time must not be less than thirty nor more than sixty days from the date of the order. (5) Notice of hearing must be posted on the land of each person affected at least ten days before the day of hearing. (6) Persons claiming damages may present their claims at the time set for hearing. The board must, by ordinance, determine the necessity, may confirm the report, and award compensation. The compensation is to be paid out of the funds of the town. (7) Any owner not satisfied with an award of damages may commence suit within ten days to have the amount determined. This provision is probably invalid; for an owner is entitled, in all cases of eminent domain, to have the matter settled by a trial in court.[9] While a trial is here provided for, the owner is compelled to take the initiative.

§ 960. **Gilroy.**—Gilroy is incorporated under a special act of the legislature passed in 1870 and amended in 1872.[10] The act prescribes a complete procedure for street improvement and for street opening. The procedure for street improvement is practically identical with that prescribed by the special act incorporating Santa Clara, and what has been said in regard to that applies here.[11] The street opening procedure is quite different. It requires a court proceeding for the determination of damages; but provides that damages shall be ascertained by commissioners appointed by the court, subject to the right of the judge to approve their report. This procedure is probably invalid; for a person whose property is to be taken for public use is entitled to a

[9] See ante, sec. 724.

[10] See Stats. 1870, p. 263; Stats. 1872, p. 263.

[11] See ante, sec. 959.

jury trial.[12] The statutory provisions are set out in full in the Appendix.

§ 961. **Nevada City.**—Nevada City is incorporated under a special act of the legislature which prescribes the procedure for street improvement.[13] In brief it is as follows: (1) The owners of more than one-half of the frontage may petition to the board of trustees to have the work done. (2) Thereupon the board of trustees shall order the work done, but it may first receive and consider remonstrances for the purpose only of ascertaining whether the petitioners truly comprehend more than one-half of said owners. The improvement must extend for the entire width of the street. (3) After ordering the work, the board of trustees must cause notice calling for bids to be published for a period of ten days in a daily newspaper published in the city. (4) Bids must be opened by the trustees and publicly declared and the contract must be awarded to the lowest bidder. The work must be done under the direction of the street committee. The contract must contain a stipulation that the city shall not be liable for any portion of the cost, except for work on crossings. (5) Within five days from the award, however, the owners of a majority of the frontage may elect to take the contract for the price at which it was awarded. (6) When required by the board of trustees the town marshal must make a list which shall state the value and the assessment per foot for each separate parcel of land liable. The total expense is to be assessed upon and borne "with absolute equality by all lands fronting thereon; the expense to be calculated upon and borne by each block separately and in proportion to the frontage, and a charge per front foot sufficient to cover such total expense of the work on each block; provided, that all street crossings, and the squares formed by the junction of two or more streets, shall be paved, graded or planked, and kept in repair at the expense of the city." (7) The tax collector

[12] See ante, sec. 724.
[13] Stats. 1877–78, p. 22.

must publish a copy of the assessment-roll in a newspaper designated by the president of the board of trustees for a period of five days. For twenty days after the expiration of the period of publication he must collect assessments due. If any assessments are unpaid the board may instruct the collector to proceed with the collection thereof in the manner prescribed for the collection of state and county taxes. It is probable that it will be held that this does not require the use of the present procedure which provides for a sale to the state. Repairs are to be done by the owners of the property fronting on the portion of the street out of repair upon notice from the town marshal. It is to be noted that this act makes no provision for a hearing prior to the time when the assessment becomes final. Unless by construction the courts can find a hearing provided for, it is probable that the procedure is invalid.[14] The remonstrance provided for applies only to cases where the petition is not sufficiently signed. An owner is entitled to be heard as to the assessment on his lot before the lien becomes final.

[14] See ante, secs. 6–14.

PART V.
STREET WORK UNDER PRIVATE CONTRACT.

§ 962. Right to do work by private contract.
§ 963. Necessity for permit—Grading.
§ 964. Same—Other work.
§ 965. Contract need not be in writing.
§ 966. Form of contract.
§ 967. Rules governing contracts.
§ 968. Contract to pay for work done under void public contract.
§ 969. Right to lien—In general.
§ 970. Same—Contract with reputed owner gives no right.
§ 971. Same—Contract with executor gives no right.
§ 972. Same—Who may claim.
§ 973. Same—Owner need not post notice of nonliability.
§ 974. Same—Can be claimed only against lot in city or town.
§ 975. Extent of lien.
§ 976. Duration of lien.
§ 977. Priorities.
§ 978. Claim of lien—Time of filing.
§ 979. Same—Contents.
§ 980. Assignments.
§ 981. Credit for work done.

§ 962. **Right to Do Work by Private Contract.**—Under certain conditions, property owners are allowed to contract for street work in front of their property, without any public proceeding. Their liability for such work rests upon contract; and they may be sued in case of nonpayment of the contract price. Their liability is personal.[1] A judgment obtained on such a contract may be enforced by execution against any of the property of the debtors not exempt from execution. The liability being contractual, an attachment may issue. An additional remedy is given to the contractor under the mechanic's lien law.[2] It is manifest that

1 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
2 See Code Civ. Proc., sec. 1197.

the principles applicable to public contracts do not apply. The right to recover depends upon the rules applicable to contracts in general and to mechanics' liens. Public streets, in general, are under the control of the local authorities. Hence it is important to determine at the outset when and under what conditions property owners may contract privately for street work.

§ 963. **Necessity for Permit—Grading.**—In discussing the necessity for a permit before a valid private contract for street work can be entered into, a distinction must be noted between contracts for grading and contracts for other street work. It is held that no valid contract for grading can be entered into until a permit is obtained; and that the permit must be obtained in the manner prescribed by law. In passing upon this, the Supreme Court said: "The general street law of 1885, as amended in 1889, contains very full and complete provisions for work upon public streets. The general rule is that the work is to be done by contract and to be paid for by assessments of the expense upon the adjoining property owners in the proportions fixed by the statute. The only exception to this rule is found in subdivision 10 of section 7 of the act, whereby it is provided that: 'It shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform at his or their own expense (after obtaining from the council permission so to do, but before said council has passed its resolution of intention to order grading inclusive of this) any grading upon said street to its full width, or the center line thereof, and to its grade as then established,' etc. And in section 68 of the Consolidation Act it is provided that: 'Every ordinance or resolution of the board of supervisors, providing for any specific improvement, the granting of any privilege . . . . , shall, after its introduction in the board, be published, with the yeas and nays, in some city daily newspaper at least five successive days before final action by the board upon the same,' etc. From the foregoing provisions

of the statute it is evident that the owners of lots fronting on Market street had no right to proceed to grade the street, or to contract with anyone else to grade it, until after they had obtained permission from the board of supervisors to do so, and that such permission was a *privilege* which could only be granted in the mode prescribed, namely, after publication for at least five days. It must follow, therefore, as resolution No. 4498 was never published, that it never became operative, or authorized the lot owners to grade, or in any way to disturb the street in front of their premises; and that their contract with the appellant to do the work which they had no right to do was void and of no effect."[3] And it is held that an injunction will issue to prevent the tearing up a street for unauthorized grading.[4]

§ 964. **Same—Other Work.**—There is not the same restriction, however, in regard to other street work. Referring to the case just quoted, the Supreme Court, in a later case, said: "That case, however, was decided upon the provision in subdivision 10 of section 7 of the Street Improvement Act, which declares that the owners of land may perform the 'grading' upon the street in front of their property 'after obtaining permission from the council to do so.' The contract in the present case is for work other than grading, and this provision of the section has no application. A contract is not to be held unlawful unless it is either contrary to some express provision of the law or to its policy.[5] This restriction on property owners from doing work upon the street in front of their own property is limited to grading, and the provision in a subsequent portion of the section that 'whenever any owner or owners of any lots or lands fronting on any street shall have heretofore

[3] City and County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396. See, also, De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

[4] City and County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396.

[5] Civ. Code, sec. 1667.

done or shall hereafter do any work (except grading) on such street in front of any block at his or their expense,' the work so done shall be excepted from any order for improving the street, implies the right of the owner to do such work and to contract therefor without obtaining such permission."[6] In the absence of local regulation, the provision of section 602 of the Penal Code prohibiting digging in streets without the license of the proper authorities, is not applicable.[7] Public streets are under the control of the city authorities; and it is competent for the council, by ordinance, to prohibit work without a permit.[8] Without such authority, it would be difficult to regulate the character of work done upon streets. Where a permit is made necessary, it follows, of course, that no work can be done without it.

§ 965. **Contract Need not be in Writing.**—Prior to 1911, section 1183 of the Code of Civil Procedure required that building contracts be in writing when the contract price exceeded one thousand dollars; and that the contract, or a memorandum thereof, be filed with the county recorder before the commencement of work. It was held that these provisions did not apply to street work. In upholding an oral contract for such work, the Supreme Court said: "It is sufficient to say, in answer to this position, that the section referred to does not, by its terms, expressly relate to building sidewalks in cities, and we are unwilling to construe the section as applying to any contract not clearly within its letter as well as its reason. Section 1191 of the Code of Civil Procedure is the one that governs contracts for the construction of sidewalks, and that section does not provide

[6] Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006. See, also, Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786.

[7] Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557.

[8] See Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006. See, also, Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107, where a permit was said to be necessary. The circumstances do not appear.

that the contract for such work, when exceeding one thousand dollars, shall be void if not in writing."[9]

§ 966. **Form of Contract.**—The contract for the work may be in the form of a subscription contract, whereby the obligation of each subscriber is limited and several, and not joint. Thus, each owner may, in the one agreement, bind himself for only a portion of the expense, while the contractor may bind himself to do all the work.[10] The contract need not be contained in one instrument. Several instruments may be considered together as constituting one contract. Thus, the contract for the work and another contract, executed contemporaneously, providing for a lower price, may be considered together.[11] Inasmuch as the contract need not be in writing, it follows that where the instrument does not purport to contain all the terms, parol evidence is admissible to show other terms.[12] Of course if the written contract alone is pleaded, and if it is so uncertain as not to be sufficient in itself, there can be no recovery.[13]

§ 967. **Rules Governing Contracts.**—Aside from the necessity of a permit in certain cases, and one other requirement of the Vrooman Act, contracts for street work are governed by the ordinary rules relating to contracts. Where the contract calls for payments in installments, and there is no provision for accelerated maturity, a default in the payment of one installment does not make the other installments due.[14] In a personal action to recover the amount due, the ordinary rules of pleading and evidence applicable to actions on contracts apply. Where a contract provides that the number of cubic yards of grading done

[9] Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109.

[10] O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939. This case states the form of contract in full.

[11] Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006. See, also, Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.

[12] Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109.

[13] Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.

[14] Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006.

shall be estimated by the city and county surveyor, a certificate of that official is admissible to prove the amount.[15] The fact that an owner sees work being done and makes no protest, and that he makes suggestions as to the mode of doing it, will not raise an implied promise to pay.[16]

Section 5 of the Vrooman Act, as amended in 1911, provides, "that all contracts entered into between the owners of any property and the contractor or his agents to perform the work of improvement on any street, alley, lane, avenue, place, or court, shall be in triplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the city, one copy thereof shall be held by the contractor or his agent, and one copy thereof duplicate shall be held by the owners."

§ 968. **Contract to Pay for Work Done Under Void Public Contract.**—Where work has been done under a public contract, but by reason of some defect the assessment is not collectible, the owner may agree that, in consideration of further work, he will pay the assessment. Such an agreement can be enforced by the contractor.[17] The suit is based upon the agreement and not upon the assessment. Evidence of an assignment of the assessment may be received, however, as tending to show an assignment of the demand.[18] It would seem clear that in such a case no lien can be enforced against the land, unless the additional work is done in front of the promisor's land, in which case the lien would be limited to the amount agreed to be paid for that work.

§ 969. **Right to Lien—In General.**—The provision for a lien for work done under a private contract for street

15 O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939.
16 Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107.
17 Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557.
18 Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557.

work is contained in section 1191 of the Code of Civil Procedure. That section reads: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished." This section, as it now reads, is an amendment adopted in 1887. As we shall see, it has been held unconstitutional in part; and there is a serious question as to whether or not it supersedes the former provision.[19] The section, prior to 1887, read as follows: "Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, has a lien upon such lot for his work done and materials furnished." So far as we are concerned, the only material difference between the two provisions is that the amendment of 1887 refers to the reputed owner while the earlier provision refers to the owner.

§ 970. Same—Contract With Reputed Owner Gives No Right.—This section is unconstitutional in so far as it authorizes a lien for work done at the direction of the reputed owner only. The Supreme Court has said upon this point: "The owner of real property may, by his acts or conduct, be estopped from questioning the acts of a reputed owner of such property, and may thereby be bound by the acts of such reputed owner; but, in the absence of the elements of an estoppel, he will not be bound by the unauthorized acts of one who is merely reputed to be the owner of the land. He cannot be deprived of his title to the land, nor can a lien be imposed thereon, against his will, by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land, unless he has in some

[19] See Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329.

way held such person out as the reputed owner, with authority to do the act, or make the agreement by which it is sought to create the lien. It is no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon, against the will of the real owner, than it would be to authorize such reputed owner to transfer the title to said land; and we hold, therefore, that, so far as the foregoing section of the code purports to authorize the creation of a lien upon land, by virtue of a contract for the improvement of the street adjacent thereto, entered into with one who is only the reputed owner of the land, or to affect the interest of the real owner therein, it is unconstitutional."[20] The effect of this decision is not to abolish all liens for street work. It possibly has the effect, however, of a judicial declaration that the amendment of 1887 did not change the section as it stood prior to that time.[21] Prior to 1887 the statute provided for a lien only for work authorized by the owner.

§ 971. **Same—Contract With Executor Gives No Right.** An executor, without the consent of the court, cannot enter into a contract which will entitle the contractor to a lien. Hence, no lien can be claimed upon property of an estate for street work done under contract with the executor of the estate.[22] And no right to a lien could be subsequently conferred by agreement of the heirs.[23]

§ 972. **Same—Who may Claim.**—Section 1191 apparently gives a lien only to persons who perform work at the request of the owner. Hence it would seem that a lien cannot be claimed by subcontractors, laborers, and materialmen who are employed by the contractor.

20 Santa Cruz Rock Pav. Co. v. Lyons, 117 Cal. 212, 59 Am. St. Rep. 174, 48 Pac. 1097.

21 For a full discussion of this question, see Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329.

22 San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255.

23 Id.

§ 973. **Same—Owner Need not Post Notice of Nonliability.**—Section 1192 of the Code of Civil Procedure provides that an owner, not a party to the contract, who knows that work is being done, must, within ten days after obtaining such knowledge, post and record a notice that he will not be responsible; and if he fails to do so, the property is subject to a lien for the work. Prior to 1911, it was held that this section did not apply to street work.[24] Hence, it was not necessary for the owner to post any notice whatever. Knowledge of the work may be shown, however, as tending to prove agency; and it bears upon the question of estoppel.[25] The effect of the amendment of 1911 is not entirely clear. The section now applies, apparently, to all "work" mentioned in the preceding sections; but it is only for work "upon any land with the knowledge of the owner or of any person having or claiming any estate therein." This apparently refers to work done upon the land liable, and not to work upon the street. Hence, I believe the section is still inapplicable to street work.

§ 974. **Same—Can be Claimed Only Against Lot in City or Town.**—A lien can be claimed under section 1191 only against a lot in an incorporated city or town. Hence where the complaint shows that the work is to be done outside such a city or town, there is no right to a lien.[1] This does not mean that the owner of country property cannot contract for work upon a road in front of his premises. He may so contract, but the obligation must be enforced in the same manner as any other contractual obligation.

§ 975. **Extent of Lien.**—The lien is not limited to the cost of work done in front of the premises. Where the work is a general improvement, and a number of property owners

[24] Santa Cruz Rock Pav. Co. v. Lyons, 117 Cal. 212, 59 Am. St. Rep. 174, 48 Pac. 1097; Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329.

[25] Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329.

[1] Durrell v. Dooner, 119 Cal. 411, 51 Pac. 628.

agree to share the total expense, the property of each owner is subject to a lien for the proportion for which such owner has assumed responsibility. Thus, in upholding a lien for the construction of a sewer, the Supreme Court said: "The plaintiffs improved their lots at their request, and their claim of lien is for no more than the agreed value of the improvement. The fact that the contract price included the general and incidental expenses of the system, as well as the cost of the branch sewers in front of the respective lots, is no impeachment of this statement. When a system of sewers is constructed under the orders of a city council in the usual way, all these expenses are apportioned to the several lots and become a part of the whole amount secured by the lien. And justly and reasonably so. A branch sewer laid in front of a lot, but unconnected with a main or outfall sewer would be simply a nuisance. To make it a real improvement it must be connected with other parts of the system, and the main sewers must be furnished with the means of cleansing, ventilation, and inspection, such as manholes, lampholes, etc. Street crossings must also be restored where the sewers are laid, and the labor and services of the official engineers and inspectors must be compensated by the contractor. These costs, appertaining to the whole system, and essential to its existence and efficiency, must be apportioned, and whether they are assessed by the superintendent of streets in the usual way or apportioned by voluntary agreement of the lot owners according to frontage or by some other method, the share apportioned to each lot is to be deemed a part of the price of the improvement to that lot, and if so, it is a lien thereon."[2]

§ 976. **Duration of Lien.**—The duration of the lien is governed by section 1190 of the Code of Civil Procedure, which provides: "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in

2 Williams, Belser & Co. v. Rowell, 145 Cal. 259, 78 Pac. 725.

a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than one year from the time the work is completed, by any agreement to give credit, and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution, and in all cases the dismissal of such action (unless it be expressly stated that the same is without prejudice) or a judgment rendered therein that no lien exists, shall be equivalent to the cancellation and removal from the record of such lien." This has been held to be a statute of limitation.[8] Prior to the amendment of 1911, it was held by some of the Superior Courts that section 1190 did not apply to street work. The wording of the section, and the cases holding sections 1183, 1188 and 1192 inapplicable were relied upon. The amendment of 1911, however, clearly makes the section applicable to all liens authorized by the chapter.

§ 977. **Priorities.**—The lien for work done under a private contract is not entitled to the same priority given to liens for assessments to pay the cost of public contracts. Assessments are in the nature of taxes, and are governed largely by the rules applicable to taxation. The lien under a private contract, however, depends upon the mechanic's lien law, and the provisions of that law as to priorities prevail. Section 1186 of the Code of Civil Procedure provides: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance, which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or

[8] Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681.

the materials were commenced to be furnished." Accordingly, it is held that the lien for street work under a private contract is subsequent to the lien of a mortgage recorded before the commencement of work.[4]

§ 978. **Claim of Lien—Time of Filing.**—The first step in the enforcement of the lien given by section 1191 is the filing of a claim of lien in the office of the county recorder. Section 1187, as amended in 1911, reads in part as follows: "Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county or city and county in which such property or some part thereof is situated a claim of lien. . . . . The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. The fee for recording the same shall be one dollar. In case such notice be not so filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of

[4] Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986. It is beyond the scope of this work to discuss the general subject of priorities of mechanics' liens. The reader is referred to works upon that subject.

lien must be filed within ninety days after the completion of any building improvement or structure, or the alteration, addition or repair thereto." It is probable that the provision for a notice of completion, as stated in the amended section, applies to street work contracts. However, if my contention that section 1191 gives a lien only to the contractor is correct, the owner is not materially injured by a failure to file such a notice. The first part of the section is now clearly applicable to street work. Prior to the amendment of 1911, however, it was held by some of the Superior Courts that section 1187 did not apply to street work. In a case arising under an earlier provision, it was assumed that the contractor is entitled to the benefit of the provision in favor of an original contractor.[5] The time for filing liens begins to run from the date of completion, and not from the date of acceptance by the street superintendent.[6] This is the rule even in cases when the contract provides for such an acceptance before payment. If a notice of completion is filed, the contractor should certainly file his lien within the sixty days.

§ 979. **Same—Contents.**—The claim must contain "a statement of his demand after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the price if any agreed upon for the same and when payable, and of the work agreed to be done and when the same was to be done, if agreed upon, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."[7]

This is the general provision as to the contents of a mechanic's lien; and it is beyond the scope of this work to discuss it in detail. We shall merely consider matters

[5] Beatty v. Mills, 113 Cal. 312, 45 Pac. 468.
[6] Beatty v. Mills, 113 Cal. 312, 45 Pac. 468.
[7] Code Civ. Proc., sec. 1187.

which pertain specially to street work. Although the work must be ordered by the real owner, a claim of lien is not insufficient because it merely states the name of the reputed owner.[8] Where no time of payment is provided for, the lien may so state, although the law construes the contract to require payment upon completion.[9] It is not necessary to state expressly that the property is situated in an incorporated city or town. Thus, a description of property as "situate in the city of San Diego, county of San Diego, state of California," is a sufficient allegation that the property is within an incorporated city or town, for the court will take judicial notice that San Diego is an incorporated city.[10] The provision of section 1188 that where one claim is filed against two or more buildings, the claimant must designate the amount due on each, does not apply to street work.[11] And even if applicable in general, it would not apply where the work is such that the separate amounts cannot be determined.[12]

§ 980. **Assignments.**—One who takes a contract to do street work may, in general, assign his contract; and the assignee may perform the work thereunder and claim a lien for the value thereof.[13] Where the assignment is made after the work is partly done, and the assignee finishes it, he can claim a lien only for the portion he has done.[14] A perfected lien may be assigned, or rather it passes with an assignment of the demand for which it stands as security.[15] The mere right to take a lien in the present or future is not assignable.[16] In other words, after the work is done the

8 Bryan v. Abbott, 131 Cal. 222, 63 Pac. 363; Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329.
9 Bryan v. Abbott, 131 Cal. 222, 63 Pac. 363.
10 Bryan v. Abbott, 131 Cal. 222, 63 Pac. 363.
11 Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986.
12 Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986.
13 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
14 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
15 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
16 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.

contractor cannot assign his right to file a lien. This does not mean, however, that he cannot assign his claim after the work is done but before a lien is filed. He may so assign it, and the assignee may recover a personal judgment thereon.[17] An assignee takes only the right of the assignor. Thus, where the assignor has made a valid side agreement that an owner shall not be charged, the assignee is bound thereby.[18]

§ 981. **Credit for Work Done.**—An owner who has done grading by private contract is entitled to credit for the amount only in case he obtains a certificate as to the amount from the city engineer.[19]

No certificate is required for credit for other street work done by private contract. This is provided for in subdivision 9 of section 7 of the Vrooman Act: "Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do, any work (except grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, as provided in subdivision eleven of this section of this act; provided, that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time said order is passed."[20]

17 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
18 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902.
19 See ante, sec. 201.
20 See ante, sec. 201.

PART VI.
GENERAL TAXATION STATUTES.

§ 982. In general.
§ 983. Municipal Improvement Act of 1901—In general.
§ 984. Same—Outline of the procedure.
§ 985. Same—Method of awarding contract.
§ 986. Sewer District Act of February 13, 1911.
§ 987. Sewer District Act of April 14, 1911.
§ 988. Sewer District Act of 1909.

§ 982. In General.—In addition to the statutes already considered, there are several which provide methods for raising money for street work by general taxation. Matters of general taxation are beyond the scope of this work. However, for completeness, I shall merely mention the distinctive features of these statutes, without attempting a detailed discussion. It must be borne in mind that these are general statutes dealing with municipal affairs. Hence they do not apply when a complete charter scheme for the same work is provided.[1] Where, however, the charter is silent, these statutes do apply; and their effect cannot be impaired by a city ordinance prescribing another procedure, unless the charter expressly authorizes the adoption of such an ordinance.[2]

§ 983. Municipal Improvement Act of 1901—In General. The Municipal Improvement Act of 1901, sometimes known as the City Bond Act, provides for the issuance of bonds payable out of the city revenues for various kinds of municipal improvements. It is the successor of the Municipal In-

[1] See Law v. City and County of San Francisco, 144 Cal. 384, 77 Pac. 1014.

[2] Clouse v. City of San Diego (Cal.), 114 Pac. 573 (decided March 8, 1911).

debtedness Act of 1889. It was passed at the same session as the Local Improvement Act of 1901, which provides for the issuance of bonds for street work payable out of a local improvement fund raised by a special assessment. That act, however, did not affect the Municipal Improvement Act.[3] By the express terms of section 2, the Municipal Improvement Act authorizes the issuance of bonds to pay for sewer and street work.[4] We have already seen that by the terms of the Vrooman Act, cities are authorized to pay the whole or a part of the cost of street work. The present act provides a method by which the necessary funds may be obtained.

§ 984. **Same—Outline of the Procedure.**—In outline the procedure required by this act is as follows: (1) The legislative body must pass a resolution by a vote of two-thirds of its members determining that the public interest or necessity requires the work, and that the cost will be too great to be paid out of the ordinary annual income and revenue of the municipality. This resolution must be approved by the executive of the city. (2) At a subsequent meeting the legislative body, by a vote of two-thirds of its members, approved by the executive of the city, must pass an ordinance calling a special election and submitting to the qualified voters of the city the proposition of incurring the indebtedness for the purpose set forth in the resolution. The contents of the ordinance are prescribed in detail in section 2. (3) The ordinance must be published once a day for at least seven days in a newspaper. (4) If two-thirds of the voters vote in favor of the proposition, bonds must be issued to cover the cost of the work. The act goes into

[3] Town of Mill Valley v. House, 142 Cal. 698, 76 Pac. 658.

[4] Town of Mill Valley v. House, 142 Cal. 698, 76 Pac. 658. See, also, City of Santa Barbara v. Davis, 6 Cal. App. 342, 92 Pac. 308; Matthews v. Town of Livermore, 156 Cal. 294, 104 Pac. 303; Clouse v. City of San Diego (Cal.), 114 Pac. 573 (decided March 8, 1911). Compare City of Redondo Beach v. Cate, 136 Cal. 146, 68 Pac. 586, denying the right to issue bonds for street work under the Municipal Indebtedness Act of 1889.

detail in regard to the form of the bonds, and as to their sale. The total issue must not exceed fifteen per cent of the assessed value of all the real and personal property of the city.

§ 985. **Same—Method of Awarding Contract.**—The method to be followed for the award of the contract is prescribed by section 9. Practically the only requirement is that the legislative body shall advertise for at least ten days in one or more newspapers published in the municipality, inviting sealed proposals. The proviso that nothing therein contained shall be construed as prohibiting the municipality from doing the work does not confer upon cities any right to do it, unless they are otherwise authorized. "Its language is entirely negative in effect. It does not purport to confer power, or remove restrictions formerly imposed by other laws. It merely declares how the previous restriction in that section shall be understood and construed."[5]

§ 986. **Sewer District Act of February 13, 1911.**—The Sewer District Act of February 13, 1911, is intended to provide an independent and alternate method for doing sewer work.[6] By the express terms of section 10, it does not affect any other act. It authorizes the legislative body, by a vote of two-thirds of all its members, approved by the executive of the municipality, to adopt a resolution declaring that the public interest and convenience require the construction of a sewer, and describing a district declared to be benefited. At a subsequent meeting, by a similar vote and approval, an ordinance may be adopted calling a special election and submitting to the electors of the district the question of incurring a bonded indebtedness to cover the cost of the work. The ordinance must be published for five days. If the ordinance receives the affirmative vote of

[5] Matthews v. Town of Livermore, 156 Cal. 294, 104 Pac. 303.
[6] See Stats. 1911, c. 23.

two-thirds of the electors voting, bonds may be issued to cover the cost of the work. The contract for the work is to be let in a manner very similar to that prescribed by the Vrooman Act; and much of what has been said in regard to that is applicable here. The bonds are to be paid by an ad valorem tax upon the property within the district.

§ 987. **Sewer District Act of April 14, 1911.**—The legislature of 1911 adopted another sewer district act which, in most respects, is the same as the one we have just considered.[7] The main distinctions are two. (1) The later act provides for the acquisition of private sewers already constructed. (2) It provides for an election throughout the whole city. There are two minor differences. (1) The later act omits the provision that the city shall not be liable.. (2) It omits the provision of section 9 of the earlier act authorizing the legislative body to require bonds of the treasurer. In other respects, the procedures prescribed are practically identical.

§ 988. **Sewer District Act of 1909.**—In 1909, an act was passed authorizing the division of cities into sewer districts, the levy of taxes upon property within such districts for a sewer system, and the issuance of bonds for such purpose.[8] No detailed procedure is prescribed. Bonds are to be voted and issued in the manner provided for the issue of city bonds.

[7] Stats. 1911, c. 455.
[8] Stats. 1909, p. 1011.

PART VII.
FORMS.

CHAPTER I.

FORMS UNDER THE VROOMAN ACT.

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§ 989. **In General.**—The Vrooman Act has been interpreted so often by the courts that the forms used in the procedure are well settled. For the most part, the following forms are those actually used by the city of Oakland. To a great extent, the forms used under this act may be used as a basis for forms under the other acts. In such cases, I have not given additional forms. The forms for use under the Improvement Act of 1911 are very similar to those used under the Vrooman Act.

§ 990. **Resolution of Intention—Front-foot Plan.**[1]

Resolved, that it is the intention of the council of the city of Oakland to order the following street work to be done, to wit:

That Third street, in said city, from the eastern line of Clay street to a line parallel to and distant seventy-five (75) feet easterly from said eastern line of Clay street, be graded, to the official grade, curbed with granite, guttered, four (4) feet wide, with basalt blocks and paved with an asphalt pavement.

Excepting, however, from all of the aforedescribed work, such portion as is required by law to be kept in order or repair by any person or company having railroad tracks thereon;

Also excepting from all of the afore-described work, such portion as is already done to the official grade.

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California, entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the several acts amendatory thereof or supplementary

[1] For a discussion of the contents of this resolution, see ante, secs 64–85.

thereto; also in accordance with the plans and specifications made therefor by the city engineer of said city of Oakland and adopted by Resolution No. 37,610 of this city council.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper and to post the same for two days conspicuously on or near the chamber door of this council.

I certify that the foregoing is a full, true and correct copy of a resolution adopted by the city council of the city of Oakland, Cal., on January 16, 1911.

FRANK R. THOMPSON,
City Clerk.

Oakland, Cal., January 20, 1911.

§ 991. Resolution of Intention—District Plan.[2]

Whereas, the public interest and convenience require that the street work and improvement hereinafter described should be done, and

Whereas, in the opinion of this city council said contemplated work and improvement is, and is hereby declared to be of more than local or ordinary public benefit,

Now, therefore, the city council of the city of Oakland does hereby resolve and declare that it is the intention of said council to order the following work and improvement to be done in said city, to wit: [Description same as in general form.]

And said council does hereby determine and declare that said proposed work and improvement is of more than local or ordinary public benefit and will affect and benefit the lands and district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvement; and that therefore the entire costs and expenses of said work and improvement shall be and is

[2] For a discussion of this resolution, see ante, secs. 86–88.

hereby made chargeable against and shall be assessed upon said lands and district, which district is within the city of Oakland, county of Alameda, state of California, and is particularly bounded and described as follows, to wit:

Beginning at a point on the southern line of William street where the same is intersected by a line parallel with and distant (measured at right angles) five hundred feet easterly from the eastern line of San Pablo avenue; thence northerly and parallel with said eastern line of San Pablo avenue to its intersection with the northern boundary line of the city of Oakland, as the same existed in 1890; thence westerly along said boundary line to a point thereon that is distant five hundred feet (measured at right angles to San Pablo avenue) westerly from the western line of San Pablo avenue; thence southerly parallel with said western line of San Pablo avenue to the northern line of Eighteenth street, as said street exists, to the west line of Grove street; and thence easterly in a direct line to the point of beginning.

Saving, excepting and excluding from said district all public streets, avenues, lanes, alleys, courts and places therein included and contained.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper and to post the same for two days conspicuously on or near the chamber door of this council.

§ 992. Affidavit of Publication of Resolution of Intention.[3]

State of California,
County of Alameda,—ss.

B. C. Mayo, being duly sworn, deposes and says: That he is and was at all the dates and times hereinafter mentioned,

[3] See ante, sec. 98.

a white male citizen of the United States, over the age of twenty-one years, a resident of said county of Alameda, and not a party to, nor interested in the matter or proceeding herein set forth.

That he is now and at all the dates and times hereinafter mentioned, was the principal clerk of the Oakland Enquirer Publishing Company, a corporation, the printer and publisher of the Oakland "Enquirer," a newspaper of general circulation, printed and published daily (Sundays excepted) in the city of Oakland, county of Alameda, state of California, and as such principal clerk has now and at all of said times had charge of all legal notices and advertisements in said newspaper. That said Oakland "Enquirer" is now and was at all the times herein mentioned, a newspaper of general circulation as that term is defined by section 4460 of the Political Code, and as provided by said section, is published for the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and is not devoted to the interests or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination, or for any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper had been established, printed and published at regular intervals in the said city of Oakland, county of Alameda, state of California, for more than one year preceding the date of the first publication of the notice herein mentioned; that said notice was set in type not smaller than nonpareil, and was preceded with words printed in black face type not smaller than nonpareil, describing and expressing in general terms, the purport and character of the notice intended to be given.

That the resolution of intention of which the annexed is a true printed copy, was printed and published in said newspaper two times (Sundays excepted), to wit, from the twenty-third day of April, 1908, to and until the twenty-fourth day of April, 1908, both days inclusive, and as often

during said period as said newspaper was published, to wit: April 23 and April 24, 1908.

B. C. MAYO.

Subscribed and sworn to before me this twenty-fifth day of April, 1908.

[Notarial Seal] WEBB N. PEARCE,

Notary Public in and for the County of Alameda, State of California.

§ 993. Affidavit of Posting Resolution of Intention.[4]

State of California,
County of Alameda, City of Oakland,—ss.

E. F. Holland, being duly sworn, deposes and says: That he is the deputy city clerk of the city of Oakland, county of Alameda, state of California, and that under the direction of the council of said city as set forth in its Resolution No. 33,772, he did actually at 4:55 o'clock P. M. of the twenty-third day of April, 1908, post conspicuously on the bulletin board of the council of the city of Oakland, in the City Hall, near the chamber door of said council, the printed resolution of intention hereto attached, and there kept the same so posted for two consecutive days thereafter.

E. F. HOLLAND.

Subscribed and sworn to this twenty-seventh day of April 1908, before me.

GEORGE SAMUELS,

Justice of the Peace of the City of Oakland, County of Alameda, State of California.

§ 993a. Notice of Street Work.[5]

NOTICE OF STREET WORK.

Notice is hereby given, that on the sixteenth day of January, A. D. 1911, the city council of the city of Oakland

[4] See ante, sec. 98.

[5] For a discussion of this notice, see ante, secs. 92–96.

passed Resolution of Intention No. 37,611, to order the following street work to be done, to wit: [Description same as in resolution of intention.]

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California, entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the several acts amendatory thereof or supplementary thereto; also in accordance with the plans and specifications made therefor by the city engineer of said city of Oakland and adopted by Resolution No. 37,610 of this city council.

For further particulars, reference is hereby made to said Resolution of Intention No. 37,611 on file in the office of the city clerk of the city of Oakland. This notice shall be published for six days in the Oakland "Enquirer," being the newspaper designated by said city council for such publication.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.
Oakland, California, January 30, 1911.

§ 994. Affidavit of Posting Notice of Street Work.[6]

State of California,
County of Alameda,
City of Oakland,—ss.

Joseph L. Coughlin, being duly sworn, says as follows: That he was at all times herein mentioned, a deputy employed in the office of the superintendent of streets of the city of Oakland; that he was instructed by Leo J. McCarthy, then the said superintendent of streets, to post, and that he actually posted, notices of street work mentioned in the city council's resolution (No. 33,772) of intention to order the work of grading, curbing, guttering and paving (as

[6] See ante, sec. 98.

therein described) Grove street in said city, from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street; that he posted said notices conspicuously along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, and not less than three in all, and when the work to be done was only upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed; that said notices were headed "Notices of Street Work," in letters of not less than one inch in length, and in legible characters stated the fact of the passage of said resolution, its date, and briefly the work or improvement proposed, and referred to the resolution, for further particulars, and that each of said notices were signed by said superintendent of streets.

That affiant posted said notices as herein specified on the thirtieth day of April, A. D. 1908.

JOSEPH L. COUGHLIN.

Subscribed and sworn to this first day of May, A. D. 1908, before me.

[Seal] FRANK R. THOMPSON,
City Clerk of the City of Oakland.

§ 995. Majority Protest.[7]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore passed a resolution of intention, No. 20,000, declaring an intention to order that Tenth street in the city of Oakland, from the east line of Webster street to the west line of Alice street be paved with asphalt;

Now, therefore, we, the undersigned, do hereby certify that we are the owners of a majority of the frontage of the property fronting on said proposed work and improvement, each owning the number of feet of frontage of property fronting on said proposed work and improvement hereinafter set opposite his or her name; and we do hereby pro-

[7] As to protests in general, see secs. 99–113. As to the effect of a majority protest, see ante, sec. 105.

test against and object to said proposed work and improvement.

Dated at Oakland, California, this first day of February, 1911.

NAMES.	NUMBER OF FEET OF FRONTAGE.

§ 996. Petition of Remonstrance.[3]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: The petition of the undersigned respectfully shows:

That your Honorable Body has heretofore commenced proceedings, under Resolution of Intention No. 20,000, providing that Tenth street in the city of Oakland from the east line of Webster street to the west line of Alice street be paved with asphalt;

That your petitioner owns a lot of land having a frontage of fifty feet on the north side of Tenth street between Webster and Harrison streets in said city of Oakland, and said lot or parcel of land is liable to assessment for the work and improvement above referred to;

That your petitioner feels aggrieved by and objects to the specifications for said work and improvement adopted by your Honorable Body, for the following reasons:

1. That said specifications require the use of low grade rock, which is wholly unfit for use for street purposes.

2. That said specifications do not require a sufficient or proper foundation to be prepared for the work.

Wherefore your petitioner remonstrates against the action of your Honorable Body in adopting said specifications and

[3] For a discussion of this petition, see ante, sec. 112.

prays that the said action may be rescinded, and that specifications free from the objections above set forth may be adopted.

Dated, Oakland, California, this first day of February. 1911.

JOHN SMITH.

§ 997. Objection to Extent of District.[9]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore passed its Resolution of Intention No. 25,000, declaring an intention to order that Tenth street in the city of Oakland, from the east line of Webster street to the west line of Alice street, be paved with asphalt; and your Honorable Body having in said resolution declared that said work and improvement is of more than ordinary public benefit and that the costs and expenses thereof should be assessed upon a district, within said city of Oakland, described in said resolution as follows, to wit:

Commencing at a point formed by the intersection of the east line of Webster street with the south line of Eleventh street, and running thence easterly along said line of Eleventh street to the west line of Alice street, running thence southerly along said line of Alice street to the northerly line of Ninth street; running thence westerly along said northerly line of Ninth street to the easterly line of Webster street; and running thence northerly along said easterly line of Webster street to the southerly line of Eleventh street and the point of commencement.

Now, therefore, we, the undersigned, do hereby certify that we are owners of property within said proposed district fronting on Eleventh street; and that we do hereby object to the extent of the proposed district as set forth in said resolution, and as ground of objection specify that the property included in said district fronting on Eleventh street will receive no benefit whatsoever from said proposed work and improvement, and therefore should not be assessed for the costs and expenses thereof, nor be included within said assessment district.

[9] For a discussion of this objection, see ante, sec. 113.

Wherefore the undersigned pray that property fronting on Eleventh street be excluded from said assessment district.

Dated this tenth day of February, 1911.

JOHN SMITH.
PETER JONES.
MARY BROWN.

§ 998. Order Fixing Time for Hearing Objections.

Resolved, that Monday, February 27, 1911, at 8:15 P. M., in the council chamber, City Hall, Oakland, be and the same are hereby fixed as the time and place for hearing the objections against the extent of the district for the paving of Tenth street from the eastern line of Webster street to the western line of Alice street in the city of Oakland under Resolution of Intention No. 25,000 filed with the clerk of the council February 10, 1911, by John Smith et al.; and the clerk of the council is directed to notify the objectors of the time and place of hearing in the manner prescribed by law.

§ 999. Notice of Hearing and Affidavit of Mailing.

OFFICE OF CITY CLERK.
City Hall.

Oakland, Cal., February 14, 1911.

You are hereby notified that the city council will meet in the council chamber, City Hall, Oakland, Cal., on Monday, the twenty-seventh day of February, A. D. 1911, at 8:15 o'clock P. M., for the purpose of hearing the objections against the extent of the district for the paving of Tenth street from the eastern line of Webster street to the western line of Alice street in the city of Oakland.

FRANK R. THOMPSON,
City Clerk.

State of California,
County of Alameda,—ss.

F. R. Thompson, being duly sworn, says that he is now and at all times herein mentioned was the clerk of the city

council of the city of Oakland; that on the fourteenth day of February, 1911, he deposited a notice of the time and place of hearing the objections to the extent of the district for the paving of Tenth street from the eastern line of Webster street to the western line of Alice street, in the city of Oakland, of which the annexed is a true copy, in the United States postoffice at Oakland, Cal., postage prepaid, addressed to each objector, to wit:

To John Smith, 367 11th street, Oakland, Cal.

To Peter Jones, 369 11th street, Oakland, Cal.

To Mary Ryan, 371 11th street, Oakland, Cal.

F. R. THOMPSON.

Subscribed and sworn to before me this fourteenth day of February, 1911.

[Notarial Seal] JOHN DOE,

Notary Public in and for the County of Alameda, State of California.

§ 1000. Resolution Overruling Objections.

Resolved, that the objections to the extent of the district for the paving of Tenth street between Webster and Alice streets, in the city of Oakland, as said district is described in Resolution of Intention No. 25,000, filed with the clerk of the council February 10, 1911, by John Smith et al., be and the same are hereby overruled.

§ 1001. Petition to Council to Order Work.[10]

To the Honorable the City Council of the City of Oakland.

Gentlemen: We, the undersigned, hereby certify that we are the owners of a majority of the frontage of property fronting on Ninth street between the eastern line of Webster street and the western line of Broadway, in the city of Oakland, each owning the number of feet of said frontage hereinafter set opposite his or her name; and we hereby respect-

[10] See ante, secs. 115, 116.

fully petition your Honorable Body to order said Ninth street between the lines above specified paved with asphalt.

Dated at Oakland, Cal., this first day of February, 1911.

Names.	Number of Feet of Frontage.
John Smith	150
Peter Jones	150
Mary Ryan	150
George Brown	100
William White	100

§ 1002. Resolution Ordering the Work.[11]

Resolved, that the public interest and convenience require the work herein described, and the council of the city of Oakland hereby orders the following street work to be done according to the plans and specifications adopted by said council on November 21, A. D. 1910, to wit:

That the crossing of Forty-seventh avenue with Melrose avenue (formerly called Boulevard avenue) in said city, be graded, curbed with redwood and paved with an oil-macadam pavement.

Also that gutters of broken rock, grouted, be laid three (3) feet in width in the southern and western quarters of the said crossing.

Also that a culvert of corrugated iron and concrete, having maximum internal dimensions of eight (8) inches in height by thirty (30) inches in width, and having two branches of like material and dimensions, be constructed in the north-eastern half of the said crossing.

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the several acts amendatory thereof or supplementary

[11] For a discussion of this resolution, see ante, secs. 129–133.

thereto; also in accordance with the plans and specifications made therefor by the city engineer of said city of Oakland and adopted by Resolution No. 37,403 of this city council, as the plans and specifications according to which said work shall be done.

The clerk of this council is hereby directed to publish this resolution for two days in the Oakland "Enquirer," a daily newspaper published and circulated in this city, and which is hereby designated for that purpose. He is also directed to post conspicuously for five days near the council chamber door of this council, notice of said work, with plans and specifications, inviting sealed proposals or bids for doing the work ordered, and to publish for two days a notice of said work, inviting sealed proposals or bids for doing the work, and referring to the plans and specifications posted and on file, the said publication to be in the said Oakland "Enquirer," the daily newspaper hereby designated for that purpose. Both of said notices shall require a certified check or a bond, either as prescribed by law, and for an amount not less than ten per cent of the aggregate of the proposal.

The sixth day of February, 1911, is hereby designated and fixed as the day on which up to the hour of 5 o'clock P. M. the said proposals or bids shall be received, and the said notices shall so specify.

I certify that the foregoing is a full, true and correct copy of a resolution adopted by the city council of the city of Oakland, Cal., on January 23, 1911.

FRANK R. THOMPSON,
City Clerk.

Oakland, Cal., January 26, 1911.

§ 1003. Notice Calling for Bids.[12]

NOTICE INVITING STREET WORK PROPOSALS.

Pursuant to statute and to Resolution No. 37,491 of the council of the city of Oakland, adopted December 5, 1910, directing this notice, said council invites sealed proposals

[12] For a discussion of this notice, see ante, secs. 134, 135.

or bids for the following street work, to be done according to the plans and specifications for said work posted and on file.

That the western half of Twentieth avenue in said city, from the southern line of East Twenty-first street to a line parallel to and distant (measured at right angles) twenty-eight (28) feet southerly from said southern line of East Twenty-first street, be graded, guttered, three (3) feet in width, with broken rock and paved with an oil-macadam pavement.

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California, entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within principalities," approved March 18, 1885, and the several acts amendatory thereof or supplementary thereto, also in accordance with the plans and specifications made therefor by the city engineer of said city of Oakland and adopted by Resolution No. 37,302 of this city council.

Said sealed proposals or bids are to be delivered to the undersigned city clerk of said city, and clerk of said city council, at his office in the City Hall of the said city of Oakland, on or before 5 o'clock P. M. on Monday, the nineteenth day of December, 1910.

Bidders must file with each proposal or bid either a check payable to the order of the mayor of said city certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or else a bond for said amount and payable, as aforesaid, signed by the bidder, and by two sureties, who shall justify before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions.

Office of the city clerk of the city of Oakland, City Hall, December 12, 1910.

FRANK R. THOMPSON,
City Clerk of the said City of Oakland and Clerk of said City Council.

By E. F. HOLLAND,
Deputy.

§ 1004. Affidavit of Posting Notice Inviting Proposals.

State of California,
County of Alameda,
City of Oakland,—ss.

E. F. Holland, being duly sworn, deposes and says: That he is the deputy city clerk of Oakland, county of Alameda, state of California, and that under the direction of the council of said city as set forth in its Resolution No. 33,953, he did actually at 4:55 o'clock P. M. of the fifteenth day of June, 1908, post conspicuously on the bulletin board of the council of the city of Oakland, in the City Hall, near the chamber door of said council, the printed notice, inviting proposals, hereto attached, together with the plans and specifications therein referred to, and there kept the same so posted continuously for five days thereafter.

E. F. HOLLAND.

Subscribed and sworn to this twenty-second day of June, 1908, before me.

MORTIMER SMITH,
Justice of the Peace of the City of Oakland, County of Alameda, State of California.

§ 1005. Bid.[13]

City of San Francisco, June 22, 1908.

To the Honorable the Council of the City of Oakland:

In compliance with the annexed advertisement, we hereby offer and agree to perform all the work and furnish the

[13] For a discussion of the requirements of the bid, see ante, secs. 137, 138.

materials according to the specifications therein referred to, and execute the contract therefor to the satisfaction and under the supervision of the superintendent of streets of said city, at the following prices, viz.:

Grading street, 2 cents per square foot.

Asphalt pavement, 19.6 cents per square foot.

Concrete gutters, 19.6 cents per square foot.

Concrete curbs, 66 cents per lineal foot.

Signed: THE BARBER ASPHALT PAVING CO.,
Contractor.
By H. W. VAIL,
Attorney in Fact.

Know All Men by These Presents: That we, The Barber Asphalt Paving Co., as principal, and John Doe and Richard Roe, as sureties, are held and firmly bound unto the mayor of the city of Oakland aforesaid, in the just and full sum of seven thousand dollars, for the payment whereof we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Given under our hands and sealed with our seals, on this twenty-second day of June, A. D. one thousand nine hundred and eight.

Now, the condition of the foregoing obligation is such that, whereas the above-bounden The Barber Asphalt Paving Co. is about to hand in and submit to the city council of the city of Oakland, the foregoing bid or proposal for the performance of the work therein mentioned, which includes the furnishing of all necessary and proper materials, according to the specifications therefor, under an invitation of said city council, contained in the notice or advertisement attached to said bid or proposal. Now, if the bid or proposal of the said The Barber Asphalt Paving Co. shall be accepted, and the said work be awarded to it thereupon by the said city council, and if the said The Barber Asphalt Paving Co. shall fail or neglect to enter into a contract therefor, and to execute [adequate bonds as required by law],

then in that case the above-named obligors will pay to the mayor of the city of Oakland the full sum of seven thousand dollars, as liquidated damages for such failure and neglect.

THE BARBER ASPHALT PAVING CO. [Seal]
By H. W. VAIL,
Attorney in Fact.
JOHN DOE. [Seal]
RICHARD ROE. [Seal]

State of California,
City of Oakland,
County of Alameda,—ss.

John Doe and Richard Roe, being severally duly sworn, each for himself, and not one for the other, deposes and says: That he is one of the sureties named in the foregoing bond, and that he executed the same; that he is a resident, and householder, and freeholder within the state of California, and is worth double the sum mentioned in said bond, over and above all just debts and liabilities, exclusive of property exempt from execution, and over and above all statutory exemptions.

JOHN DOE.
RICHARD ROE.

Subscribed and sworn to before me, this twenty-second day of June, A. D. 1908.

[Notarial Seal] WILLIAM JONES,
Notary Public in and for the County of Alameda, State of California.

§ 1006. Resolution of Award.[14]

Resolved, that the council of the city of Oakland, having in open session on the sixth day of July, A. D. 1908, opened, examined, and publicly declared all sealed proposals or

[14] For a discussion of this resolution, see ante, sec. 141.

bids offered for the following work, to wit: [Description of work as in resolution of intention], hereby rejects all of said bids except that next herein mentioned, and hereby awards the contract for said work to the lowest regular responsible bidder, to wit: to The Barber Asphalt Paving Co., at the prices specified in their proposal on file for said work, to wit:

Grading street, 2 cents per square foot.

Asphalt pavement, 19 6/10 cents per square foot.

Concrete gutters, 19 6/10 cents per square foot.

Concrete curbs, 66 cents per lineal foot.

The clerk of this council is hereby directed to post notice of this award conspicuously, for five days, on or near the chamber door of this council, and also publish said notice for two days in the Oakland "Enquirer," a daily newspaper, published and circulated in this city, and hereby designated for that purpose.

Approved July 7, 1908.

FRANK K. MOTT,
Mayor of the City of Oakland.

§ 1007. Notice of Award of Contract.[15]

NOTICE OF AWARD OF CONTRACT.

Pursuant to statute and to Resolution No. 34,060 of the council of the city of Oakland, adopted July 16, 1908, directing this notice, notice is hereby given that the said council in open session on the sixth day of July, 1908, opened, examined and publicly declared all sealed proposals offered for the following work, to wit: [Description of work as in resolution of intention.]

And thereafter on the sixth day of July, 1908, by Resolution of Award No. 34,060, awarded the contract for said work to the lowest regular responsible bidder, to wit: to The Barber Asphalt Paving Company at the prices named for said work in its proposal on file, namely:

[15] See ante, sec. 144.

Grading street, 2 cents per square foot.

Asphalt pavement, 19 6/10 cents per square foot.

Concrete gutters, 19 6/10 cents per square foot.

Concrete curbs, 66 cents per lineal foot.

Said award has been approved by the mayor of said city of Oakland.

Clerk's office, city of Oakland, July 8, 1908.

FRANK R. THOMPSON,
City Clerk of the City of Oakland.

§ 1008. Affidavit of Posting Notice of Award.

State of California,
County of Alameda,
City of Oakland,—ss.

E. F. Holland, being duly sworn, deposes and says: That he is the deputy city clerk of the city of Oakland, county of Alameda, state of California, and that under the direction of the council of said city, as set forth in its Resolution No. 34,060, he did actually at 4:55 o'clock P. M. of the eighth day of July, 1908, post conspicuously on the bulletin board of the council of the city of Oakland, in the City Hall, near the chamber door of said council, the printed notice of award of contract hereto attached, and there kept the same so posted continuously for five days thereafter.

E. F. HOLLAND.

Subscribed and sworn to this eighteenth day of July, 1908, before me.

MORTIMER SMITH,
Justice of the Peace of the City of Oakland, County of Alameda, State of California.

§ 1009. Notice of Defects in Proceedings.[16]

To the Honorable, the City Council of the City of Oakland, and to All Persons Interested in or Affected by the Proceedings Hereinafter Referred to:

Take notice that the undersigned is the owner of a lot of land situated on the south side of Tenth street between Webster and Harrison streets, in the city of Oakland, county of Alameda, state of California; that said lot is liable to assessment by virtue of proceedings commenced by the city council of the city of Oakland, by Resolution of Intention No. ——, which provides that Tenth street from the eastern line of Webster street to the western line of Alice street in said city be paved with asphalt;

That said proceedings are irregular in this, that no notice calling for bids was ever published, and that a contract for doing the work has already been awarded without such publication.

That said proceedings are defective in the same particulars in which they are irregular.

That said proceedings are erroneous in the same particulars in which they are irregular.

That said proceedings are faulty in the same particulars in which they are irregular.

That this notice is made and given pursuant to the provisions of section 5½ of an act entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, as amended by an act entitled, "An act to amend an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, by adding thereto a new section to be known as section 5½, providing for filing written notices of defects in street proceedings and that cer-

[16] See ante, sec. 145.

tain defects not claimed shall be waived," approved February 20, 1909.

Dated at Oakland, Cal., this first day of March, 1911.

JOHN SMITH.

§ 1010. Contract.[17]

This agreement, made and entered into this seventeenth day of January, A. D. 1911, by and between The Oakland Paving Company, a corporation, of the first part, and Charles S. Warner, as superintendent of streets of the city of Oakland, state of California, by the authority granted to him by an act of the legislature of California, entitled "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and all acts amendatory thereof, party of the second part.

Whereas, the said party of the first part (as by reference to the proceedings of the council of the city of Oakland, on the third day of January, A. D. 1911) has been awarded the contract for the work hereinafter mentioned:

Now, therefore, these presents witness, that the said party of the first part, for the consideration hereinafter mentioned, promises and agrees with said Charles S. Warner, as superintendent of streets of the city of Oakland, and not otherwise, that it will do and perform, or cause to be done and performed in a good and workmanlike manner, under the direction and to the satisfaction of the said superintendent of streets, and furnish the materials required for the execution and completion thereof in compliance with the specifications to the satisfaction of said superintendent of streets, all the following work, to wit: [Description of work as in resolution of intention] in said city of Oakland, ac-

[17] For a discussion of the contract, see ante, secs. 156–166. Where public property fronts on the work, or is included within the assessment district, the contract should, in addition, contain a provision as to the payment for the share of the cost which would, but for the ownership, be a lien upon the public property: See ante, sec. 162.

cording to the plans and specifications for said work adopted by said city council on the nineteenth day of September, 1911, and on file with the city clerk of said city.

And the said Charles S. Warner, acting in his official capacity as such superintendent of streets, and not individually, hereby fixes the time for the commencement of said work to be on the twenty-first day of January, A. D. 1911, and for its completion to be within ninety days from the date of this contract, and promises and agrees that on the performance of the covenants aforesaid by the said party of the first part he will duly make and issue an assessment, and diagram and attach a warrant thereto, as provided for in the aforementioned act, for the expenses of the work aforesaid, at the following prices, to wit:

Grading street, including sidewalk (cutting), 3 cents per square foot;

Macadamizing 8 cents per square foot;

Curbing with redwood, 12 cents per lineal foot;

Gutters grouted, broken rock, 14 cents per square foot.

And it is agreed and expressly understood by the parties to this agreement, that in no case (except where it is otherwise provided in said act) will the said city of Oakland, or any officer thereof, be liable for any portion of the expense of the work aforesaid, nor for any delinquency of persons and property assessed.

And it is agreed and expressly understood by the parties to this agreement, that under it eight hours of labor shall constitute a day's work, and that the said party of the first part shall not require more than eight hours' labor in a day from any person employed by it herein.

And that in accordance with an act of the legislature of the state of California, entitled "An act fixing the minimum rate of compensation for labor on public work," approved March 9, 1897, two dollars shall be the minimum compensation paid for each day's labor upon the work embraced in this contract.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first herein written, at said city of Oakland.

[Corporate Seal]

THE OAKLAND PAVING COMPANY.
By F. W. BILGER,
Secretary.

CHARLES S. WARNER, [Seal]
As Superintendent of Streets of the City of Oakland.

§ 1011. Contractor's Bond to Secure Performance.[18]

Know All Men by These Presents: That we, The Oakland Paving Company, a corporation, as principal, and F. J. Woodward and Geo. M. Shaw, as sureties, residents of the county of Alameda, state of California, are jointly and severally bound unto the city of Oakland, state of California, in the sum of two hundred dollars, gold coin of the United States of America, to be paid to the city of Oakland, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth day of January, 1911, and executed at said city of Oakland.

The condition of this obligation is such, that if the above-bounden The Oakland Paving Company, a corporation, or assigns, shall in all things stand to and abide by, and well and truly keep, and faithfully perform, the covenants, conditions and agreements, in a contract made between The Oakland Paving Company, as contractor, and Charles S. Warner, as superintendent of streets of the city of Oakland, of even date herewith, for furnishing materials in compliance with the specifications and performing the following work, to wit: [Description of work as in resolution of intention], on its part, to be kept and performed in the man-

[18] For a discussion of this bond, see ante, sec. 151.

ner and form therein specified, then the above obligation to become void, else to remain in full force and virtue.

[Corporate Seal]

THE OAKLAND PAVING COMPANY.

By F. W. BILGER,

Secretary.

F. J. WOODWARD. [Seal]

GEO. M. SHAW. [Seal]

State of California,
County of Alameda,
City of Oakland,—ss.

F. J. Woodward and Geo. M. Shaw, sureties in the within undertaking, being duly sworn, says, each for himself, and not one for the other, that he is worth double the sum mentioned therein, to wit, is worth the sum of four hundred dollars, over and above all statutory exemptions, and that he is a resident of said county, and is a freeholder and householder therein.

F. J. WOODWARD.
GEO. M. SHAW.

Subscribed and sworn to before me this seventeenth day of January, A. D. 1911.

[Notarial Seal] H. E. JOHNSTON,
Notary Public in and for the County of Alameda, State of California.

§ 1012. Contractor's Bond to Protect Laborers and Materialmen.[19]

Know All Men by These Presents: That whereas, on the third day of January, 1911, under the provisions of an act of the legislature of the state of California, entitled "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the several acts amendatory thereof, the council of the city of Oakland

[19] For a discussion of this bond, see ante, secs. 152–154.

awarded a contract to The Oakland Paving Company, a corporation, as contractor, for the following described street work in the city of Oakland, to wit: [Description of work as in resolution of intention.]

And whereas, said The Oakland Paving Company, a corporation, as such contractor, is about to enter into a contract with Charles S. Warner, as superintendent of streets of said city of Oakland for the performance of said street work, pursuant to said award, and

Whereas, said act above mentioned, as amended by the legislature of the state of California in the year 1899, requires every contractor, person, company or corporation, including contracting owners, to whom is awarded any contract for street work under said act, before executing the said contract, to file with the superintendent of streets a good and sufficient bond, approved by the mayor, in the sum of not less than one-half of the total amount payable by the terms of said contract, and which shall inure to the benefit of any and all persons, companies and corporations who perform labor on, or furnish materials to be used in the said work of improvement.

Now these presents witnesseth, that the said The Oakland Paving Company, a corporation, as contractor and principal, and F. J. Woodward and Geo. M. Shaw, as sureties, are held and firmly bound unto any and all persons, companies or corporations who perform labor on, or furnish materials to be used in the said work of improvement above mentioned, in the sum of two hundred dollars (being not less than one-half of the total amount payable by the terms of said contract), for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this seventeenth day of January, 1911.

The conditions of the above obligation are such that if the said The Oakland Paving Company, a corporation, the contractor, to whom said contract has been awarded as

aforesaid, shall fail to pay for any material so furnished for the said work of improvement above mentioned, or for any work or labor done thereon of any kind, the said sureties will pay the same in an amount not exceeding the said sum hereinbefore specified.

[Corporate Seal]

THE OAKLAND PAVING COMPANY.
By F. W. BILGER,
Secretary.
F. J. WOODWARD. [Seal]
GEO. M. SHAW. [Seal]

State of California,
County of Alameda,—ss.

F. J. Woodward and Geo. M. Shaw, the sureties in the within undertaking, each being duly sworn, each for himself says:

That he is a resident and householder within the state of California, that he is worth double the sum mentioned herein over and above all just debts and liabilities, exclusive of property exempt from execution, and over and above all statutory exemptions.

F. J. WOODWARD.
GEO. M. SHAW.

Subscribed and sworn to before me this seventeenth day of January, A. D. 1911.

[Notarial Seal] H. E. JOHNSTON,
Notary Public in and for County of Alameda, State of California.

§ 1013. Property Owner's Election to Take Contract.[20]

Know All Men by These Presents: That the undersigned, owner of more than three-fourths, to wit, all of the frontage of lots and land upon the northern half of Third avenue (sometimes known as Lawton avenue) between lines at right angles to the northern line of said Third avenue and re-

[20] See ante, secs. 147, 148.

spectively distant thereon four hundred forty (440) feet and eight hundred fifty-five (855) feet easterly from the eastern line of College avenue, all in the city of Oakland, county of Alameda, state of California, does hereby elect to take the work of grading, curbing and macadamizing said Third avenue, sometimes known as Lawton avenue, from between lines at right angles to the northern line of said Third avenue and respectively distant thereon four hundred forty (440) feet and eight hundred fifty-five (855) feet easterly from the eastern line of College avenue, as set forth in the specifications for said work filed in the office of the clerk of the city of Oakland, July 5, 1910, and to enter into a written contract with the superintendent of streets of said city to do and perform the work hereinbefore described and furnish the materials therefor at the prices specified in the bid of the Oakland Paving Company, a corporation, to whom said work was awarded by the city council of the city of Oakland, by its resolution of award passed therefor and adopted September 19, 1910.

Dated September 25, 1910.

ELIZA J. WRIGHT.

State of California,
County of Alameda,—ss.

Eliza J. Wright, being duly sworn, deposes and says: That she is the person whose name is subscribed to the notice and election hereto attached; that she is the owner of more than three-fourths, to wit, all of the frontage of lots and land upon the northern half of Third avenue (sometimes known as Lawton avenue) between lines at right angles to the northern line of said Third avenue, and respectively distant thereon four hundred forty (440) feet and eight hundred fifty-five (855) feet easterly from the eastern line of College avenue, all in the city of Oakland, county of Alameda, state of California, whereon work described in the Resolution of Award No. 37,148, passed by the council of the city of Oakland, on September 19, 1910, is to be done.

ELIZA J. WRIGHT.

Subscribed and sworn to before me this twenty-fifth day of September, 1910.

[Notarial Seal] E. G. RYKER,

Notary Public in and for the County of Alameda, State of California.

§ 1014. Property Owner's Contract.[21]

AGREEMENT.

This agreement, made and entered into this twenty-fifth day of September, A. D. 1910, by and between Eliza J. Wright, the party of the first part, and Charles S. Warner, as superintendent of streets of the city of Oakland, county of Alameda, state of California, by virtue of the authority granted to him by an act of the legislature of the state of California entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and all acts amendatory thereof, the party of the second part,

Witnesseth: That whereas on the nineteenth day of September, A. D. 1910, the council of the city of Oakland awarded the contract for the work hereinafter mentioned to Oakland Paving Company, a corporation, and whereas the said Eliza J. Wright, the owner of more than three-fourths, to wit, all of the frontage of lots and land upon the street whereon said work is to be done, has within the time allowed by law elected to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded,

Now, therefore, these presents witness that the said party of the first part, for the considerations hereinafter mentioned, promises and agrees with said Charles S. Warner, as superintendent of streets of the city of Oakland, and not otherwise, that she will do and perform or cause to be done and performed in a good and workmanlike manner under the

[21] See ante, secs. 147, 148.

direction and to the satisfaction of the said superintendent of streets, and furnish the materials required for the execution and completion thereof in compliance with the specifications, and to the satisfaction of said superintendent of streets, the following work, to wit:

That the northern half of Third avenue (sometimes known as Lawton avenue) between lines at right angles to the northern line of said Third avenue and respectively distant thereon four hundred and forty (440) feet and eight hundred fifty-five (855) feet easterly from the eastern line of College avenue, be graded, curbed with redwood, macadamized with broken stone macadam, in a layer whose thickness gradually decreases from eight inches at the center of the roadway to six inches at the gutters; also that gutters three feet in width, of broken rock grouted, be constructed thereon, according to the specifications for said work adopted by said city council on the eleventh day of July, 1910, on file in the office of the city clerk of said city.

That the said Charles S. Warner, acting in his official capacity as such superintendent of streets, hereby fixes the time for commencement of said work to be on the first day of October, 1910, and for its completion to be within thirty days thereafter, and promises and agrees that on the performance of the covenants aforesaid by the party of the first part he will duly make and issue an assessment and diagram and attach a warrant thereto as provided for in the abovementioned act for the expenses of the work aforesaid at the following prices, to wit:

Grading street, including sidewalk (filling), 2 cents per square foot.

Macadamizing, 6 cents per square foot.

Curbing, 3x12 inches (redwood curb), 12 cents per lineal foot.

Gutters grouted (broken rock), 12 cents per square foot.

And it is further agreed and expressly understood by the parties to this agreement that in no case (except where it is

otherwise provided in said act) will the said city of Oakland or any officer thereof be liable for any portion of the expense of the work aforesaid nor for any delinquency of persons and property assessed.

And it is agreed and expressly understood by the parties to this agreement that eight hours of labor shall constitute a day's work, and that the said party of the first part shall not require more than eight hours' labor a day from any person employed by her herein.

And that in accordance with an act of the legislature of the state of California entitled, "An act fixing the minimum rate of compensation for labor on public work," approved March 9, 1897, $2 shall be the minimum compensation paid for each day's labor upon the work embraced in this contract.

In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written at said city of Oakland.

ELIZA J. WRIGHT. [Seal]
CHARLES J. WARNER, [Seal]
As Superintendent of Streets of the City of Oakland.

§ 1015. Resolution Directing Engineer to Make Plan of District.[22]

Resolved, that the city engineer be and he is hereby authorized and directed to make the necessary diagrams of the property affected or benefited and to be assessed to pay the costs and expenses of paving and otherwise improving San Pablo avenue from Grove street, on its western side, and Twentieth street on its eastern side to the northern boundary line of the city of Oakland, as the same existed in 1890, and particularly described in Resolution of Intention No. 31,967, adopted March 21, 1907. Said diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land,

22 See ante, sec. 208.

and the relative location of the same to said work, all within the limits of the assessment district made by said council.

§ 1016. **Resolution Approving Diagram—District Plan.**[23]

Resolved, that the diagram submitted by the city engineer on December 24, 1908, of the property affected or benefited by the paving and otherwise improving San Pablo avenue from Twentieth street to Thirty-sixth street as described in Resolution of Intention No. 31,967, adopted by the council of the city of Oakland on March 21, 1908, and to be assessed to pay the expenses of said work be and the same is hereby approved by the council of the city of Oakland, and the clerk of the city council is hereby directed to certify to the fact and date of such approval, and he is also directed to deliver said diagram so approved to the superintendent of streets of said city.

§ 1017. **Assessment.**[24]

Pursuant to statute, I, Charles S. Warner, as superintendent of streets of the city of Oakland, in the county of Alameda and state of California, do hereby assess and apportion, as shown hereinafter and in the diagram attached hereto, upon certain lots, portions of lots, and parcels of land fronting upon Tenth street in said city, from the center line of Jackson to the eastern line of Alice street, and upon all streets intersecting it between said lines, the sum of five hundred eighteen and 88/100 dollars ($518.88), to be paid to John Geary, his agents or assigns, to cover the sum due (including incidental expenses) for the work of sewering said Tenth street between said lines, as said work is more particularly specified in my official contract therefor with said John Geary, dated the nineteenth day of April, A. D. 1910. All of said work has been performed and materials furnished according to the specifications, under my direction and to my satisfaction and acceptance. And

[23] See ante, sec. 208.

[24] See ante, secs. 209–211.

because the names of the owners of said assessed property are unknown to me, I herein write the word "unknown" opposite the number of the lot, and the amount assessed thereon, and the number of each lot, portion of a lot, or parcel of land assessed.

Cost of the work, $518.88, as follows:

	Dollars	Cents
340.42 linear feet of 8 inch pipe sewer @ 90¢ per linear foot..	306	38
12 "Y" branches @ 45¢ each.....	5	40
1 brick manhole.....	50	
1 lamphole	10	
	371	78

INCIDENTAL EXPENSES.

Engineer's preliminary fee.....$	8	40	
Engineer's final fee.....	22		
Printing	98	70	
Inspector	18		147 10
Cost of work.....			518 88

FRONTAGE.

300 feet of 8 inch pipe sewer @ 90¢ per linear foot.....	270	
12 "Y" branches @ 45¢ each.....	5	40
1 lamphole	10	
Quota of incidental expenses.....	112	92
	$398	32

Divided among 600 feet at the rate of $0.663866 per front foot.

JACKSON STREET CROSSING.

40.42 linear feet of 8 inch pipe sewer @ 90¢ per linear foot...	36	38
1 brick manhole	50	
Quota of incidental expenses.....	34	18
	$120	56

Divided among 1000 front feet at the rate of $0.12056 per front foot.

OWNERS	Assessment No.	Assessed Upon: Block	Assessed Upon: Location or No. of Lot	Feet on Frontage	Feet on Termination	Feet on Crossing	Feet on Opposite Termination	Frontage and Termination Assessment: Dollars	Frontage and Termination Assessment: Cts.	Crossing and Opposite Termination Assessment: Dollars	Crossing and Opposite Termination Assessment: Cts.	Total Assessment: Dollars	Total Assessment: Cts.	PAYMENTS
Unknown	1	140	1	75				49	79			49	79	
Unknown	5	140	25	25		25		16	60	3	01	19	61	

§ 1018. Engineer's Certificate.[25]

I hereby certify that John Geary has sewered Tenth street from the center line of Jackson street to the eastern line of Alice street, to the official line and grade, and that the amount of work performed by the contractor on said Tenth street is as follows:

Frontage.

300 linear feet of 8 inch pipe sewer.
12 "Y" branches having 5 inch openings.
1 lamphole.

Jackson Street Crossing.

40.42 linear feet of 8 inch pipe sewer.
1 brick manhole.
Final engineering fee, $22.00.

At said city of Oakland, this twenty-ninth day of April, 1910.

F. C. TURNER,
City Engineer.

§ 1019. Warrant.[1]

By virtue hereof, I, Charles S. Warner, superintendent of streets of the city of Oakland, county of Alameda, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower John Geary, his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his warrant for the same.

Oakland, May 7, A. D. 1910.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

Countersigned by

FRANK K. MOTT,
Mayor of the City of Oakland.

Recorded May 7, A. D. 1910.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

[25] See ante, secs. 222–224.
[1] See ante, secs. 215–219.

§ 1020. Contractor's Return.[2]

State of California,
County of Alameda,
City of Oakland,—ss.

John Geary, being duly sworn, says he is the contractor named in annexed assessment, diagram and warrant; that said assessment for the total cost of certain street work upon Tenth street between Jackson and Alice streets in said city, as more fully described therein, and in the contract for said work with said John Geary, made by the superintendent of streets of said city, dated the nineteenth day of April, A. D. 1910, levied as therein described upon certain lots, portions of lots, or parcels of land, and the unknown owners thereof for the sum of five hundred eighteen and 88/100 dollars ($518.88), payable to John Geary, agents or assigns, was made, and with the city engineer's certificate of said work was recorded and delivered by said superintendent of streets on the seventh day of May, A. D. 1910, to affiant in behalf of said contractor, that there were attached to the same and delivered to the same in the same behalf at the same time by the said superintendent of streets, his diagram hereto attached, and a warrant in favor of John Geary for collecting said assessment, upon which warrant this return is indorsed; that in case of all assessments therein described, but not included in the following table, affiant has, since the date last aforesaid, in the manner hereinafter described and in behalf of said contractor, made demand upon and received full payment from the owners of each and all such assessed lots and lands; and that besides all personal demands, affiant did, wherever the name of the owner of the lot is stated as "unknown," on the assessment, on the twelfth day of May, A. D. 1910, within thirty days from date of said warrant, and between the hours of 9 A. M. and 4 P. M., in behalf of said contractor, enter upon each of the corresponding lots, portions of lots and parcels of land assessed, and with said certificate, assessment, diagram and

[2] See ante, secs. 232–240.

warrant, and in a loud audible voice, publicly make separate demands for the payment of each of said assessments from the unknown owners thereof, upon each lot, portion of lot, or parcel of land, for each of its own assessments as specified in said assessment, and that wherever he found a building, tenant or occupant upon any of said premises, besides the public demand as aforesaid, he, at the same time, in the same behalf, presenting and exhibiting said certificate, assessment, diagram and warrant, in each instance, demanded from each tenant, or occupant for the unknown owners separately the payment of each of said assessments upon said premises; and in the following table he states the name of such demandee, as "tenant," or "occupant" with the word "unknown"; but that, notwithstanding said demands, the following totals of said assessed sums, each separately demanded, and also the total, remain unpaid, to wit:

Demands Made Upon the Owners	Assessment and Diagram Numbers	Dates of Demand 19.....	Assessments Due and Unpaid		Subsequent Payments
			Dollars	Cts.	
Unknown	12	May 12, 1910	3	01	
Unknown	13	May 12, 1910	3	01	

JOHN GEARY.

Subscribed and sworn to before me this third day of June, 1910.

[Notarial Seal] E. F. GARRISON,

Notary Public in and for the County of Alameda, State of California.

§ 1021. Appeal to the Council.[3]

To the Honorable the City Council of the City of Oakland:

The appeal of John Doe respectfully shows:

That appellant is the owner of a lot of land assessed for the paving and otherwise improving Grove street in the city

[3] See ante, secs. 251-265.

of Oakland from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street, which work is more particularly described in Resolution of Intention No. 33,772, adopted April 20, 1908, by the city council of the city of Oakland; and that as such owner appellant is directly interested in the assessment heretofore made by the superintendent of streets for said work and improvement;

That appellant is aggrieved by and objects to the determination of the superintendent of streets that the work provided for in said proceedings has been completed according to the specifications for the same, and to the correctness and to the legality of the assessment heretofore made in said proceeding by the superintendent of streets, upon the following grounds:

1st. That the decision of the superintendent of streets that the contract has been properly fulfilled is against the evidence and in error, in this, that the rock used in said work did not and does not comply with the specifications adopted for said work in that it is softer than required by the said specifications.

2d. That said superintendent of streets included in said assessment sums not authorized by law, to wit, he has included, in the incidental expenses, a charge of one hundred dollars for publication of a resolution of intention for a prior proceeding for work on the same street.

Wherefore appellant appeals from said determination of the superintendent of streets and from said assessment, and prays that the acceptance of said work be set aside, that the contractor be compelled to complete the work according to the specification for the same, that the assessment be corrected, and that such other relief be granted as may be proper in the premises.

JOHN DOE.

§ 1022. Resolution Fixing Time for Hearing Appeal.

Resolved, that Monday, February 15, 1909, at 8:15 P. M., in council chamber, City Hall, Oakland, Cal., be and the

same are hereby fixed as the time and place for hearing the appeal of John Doe from the superintendent of streets' acceptance of the work and assessment in the matter of paving Grove street between San Pablo avenue and Thirty-sixth street, per Resolution of Intention No. 33,772. The clerk of the council is hereby directed to give notice of the time and place of the hearing of said appeal, also of the acts complained of, said notice to be published in the Oakland "Enquirer" for a period of five days.

§ 1023. Notice of Hearing Appeal.[4]

NOTICE OF HEARING APPEAL.

Pursuant to statute and to Resolution No. 34,773, adopted by the council of the city of Oakland, county of Alameda, state of California, on February 3, 1909, notice is hereby given that Monday, February 15, 1909, at 8:15 o'clock P. M. in council chamber, City Hall, Oakland, Cal., has been fixed as the time and place for hearing the appeal filed January 28, 1909, of John Doe, from the superintendent of streets' acceptance of the work and assessment in the matter of paving and otherwise improving Grove street in the city of Oakland from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street and more particularly described in Resolution of Intention No. 33,772, adopted April 20, 1908, by said city council.

Appellant objects to said acceptance of the work and to said assessment for the following reasons:

1st. That the decision of the superintendent of streets that the contract has been properly fulfilled is against evidence and in error, in this, that the rock used in said work did not and does not comply with the specifications adopted for said work in that it is softer than required by said specifications.

2d. That said superintendent of streets included in said assessment sums not authorized by law, to wit, he has included, in the incidental expenses, a charge of one hundred

[4] See ante, sec. 261.

dollars for publication of a resolution of intention for a prior proceeding for work on the same street.

And for said reasons, appellant appeals to the city council as provided by statute.

By order of the council, Oakland, Cal., February 8, 1909.

F. R. THOMPSON,
City Clerk.

§ 1024. Resolution Overruling Appeal.[5]

Resolved, that the appeal of John Doe filed in the office of the clerk of the council on January 28, 1909, from the superintendent of streets' acceptance of the work and assessment for paving and otherwise improving Grove street from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street, as per Resolution of Intention No. 33,772, adopted April 20, 1908, be and the same is hereby overruled, and the superintendent of streets' assessment, warrant and diagram for said work is hereby confirmed and approved.

§ 1025. Complaint to Foreclose Lien.[6]

[Title of Court and Cause.]

COMPLAINT TO FORECLOSE LIEN FOR STREET ASSESSMENT.

The plaintiff above named complains of the above-named defendants, and for cause of action avers:

1. That at and during the times of all the proceedings and acts hereinafter mentioned, the ——— of ——— was, and now is, a municipality in the state of California.

2. That on the —— day of ———, A. D. 19—, ——— street, from the ——— line of ——— street to the ——— line of ——— street, all in said —— of ———, with duly established grades and width, was and previously had been,

[5] See ante, secs. 262, 263.

[6] See ante, secs. 273–284.

and ever since has been, and now is, an opened and located street, dedicated to public use.

3. That subsequent to the day last mentioned, and before the commencement of this action, by virtue of an act of the legislature of the state of California, entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and all acts amendatory thereof, or supplemental thereto, approved previous to A. D. 19—, ——— the proceedings hereinafter stated were had—that is to say:

4. That on the —— day of ————, A. D. 19—, the ———— of said ——— passed a resolution, Number ————, wherein and whereby it resolved and declared that it was its intention to order the following described street work in said ——— to be done, to wit: That ————————

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and wherein and whereby it directed its clerk to publish and post said resolution of intention for two days in the manner next hereinafter described, and also designated the ———— as the ——— newspaper published and circulated in said ———, in which said resolution of intention should be published for two days and the notice thereof for six days as often as said ——— newspaper was issued meanwhile.

5. That said resolution was signed by said clerk and president of said ——— and was published and posted for two days by said clerk in the form and manner as follows, to wit: Said publication was on the ——— and ——— days of ————, A. D. 19—, in said ———, which was a newspaper published and circulated ——— in said ———, and said posting was conspicuously done on the bulletin board near the chamber door of said ——— for two full days, to wit: on the ——— and ——— days of ————, A. D. 19—. And that thereupon, to wit, upon the —— day of ————, A. D. 19—, the street superintendent

of said ——— caused to be conspicuously posted, along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, and, when the work to be done was only upon an entire crossing, or any part thereof, then in front of each quarter block and irregular block liable to be assessed, notices of the passage of said resolution of intention, each of which notices was headed: "Notice of Street Work," in letters of not less than one inch in length, and in legible characters, stated the fact of the passage of the resolution, its date and, briefly, the work of improvement proposed, and referred to the resolution for further particulars; and that he also caused a notice, similar in substance, to be published for six days in said ———, which was a ——— newspaper published, circulated and designated as aforesaid, which publication commenced on the —— day of ————, A. D. 19—, and ended on the —— day of ————, 19—, and was made meanwhile as often as said newspaper was issued.

6. That the owners of the majority of the frontage of the property fronting on said proposed work or improvement did not, within ten days after the expiration of the time of the publication and posting of said notice, make and file with the said clerk any written objection to said proposed work or improvement.

7. That before passing the resolution for the construction of said work or improvements, plans and specifications and careful estimates of the costs and expenses thereof had ——— been required by it to be furnished to said ——— by the ——— engineer of said ——, and special specifications therefor had ——— been furnished by him.

8. That afterward, to wit, on the —— day of ————, A. D. 19—, and subsequent both to the expiration of twenty days after the expiration of the time of said publication by said street superintendent, and to the expiration of twenty-five days after the advertising and posting of said resolution of intention, the said ——— passed a reso-

lution, Number ———, declaring that it deemed the work to be required by the public interest and convenience, and ordering and providing for said street work to be done, and by directing its clerk so to do, caused said order to be published for two days, and also in like manner caused notice thereof with specifications to be posted and kept posted conspicuously for five days, near the chamber door of said ———, inviting sealed proposals or bids for doing the work ordered, and also in like manner caused notice of said work inviting said proposals, and referring to the specifications posted or on file describing the work so ordered to be done, to be published for two days, and that the said proceedings were so posted and published as follows: The posting of said notice of the order with specifications commenced on the —— day of ————, 19—, and continued until the —— day of ————, 19—, both days included, and the publication of the order was made on the ——— and ——— days of ————, 19—, and of the notice inviting sealed proposals on the ——— and ——— days of ————, 19—, and all of said publications were made as often as the paper was issued meanwhile in the ————, which was a ——— newspaper published and circulated in said ———, and designated by said ——— therefor.

9. That on or before the —— day of ————, 19—, various sealed proposals or bids to do said street work were offered to the clerk of said ——— and that the plaintiff herein delivered to said clerk one of the said sealed proposals or bids, by which it proposed and offered to do said work fully in all respects as required by the specifications at the following prices, to wit:

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10. That said proposal or bid was accompanied by a good and sufficient bond signed by the said plaintiff and two sufficient sureties, for an amount not less than ten per cent of the aggregate of said proposal or bid, to wit: for the sum

of ——— dollars and conditioned to pay to the ——— of said ——— the full sum of ——— dollars as liquidated damages, should the said bidder fail or neglect to enter into a contract to do said work as specified, provided it should be awarded to it; the sureties on which bond justified before ———, who was then a notary public in and for ———, said county of Alameda, competent to administer an oath, each in double the said amount and over and above all statutory exemptions.

11. That on the —— day of ———, A. D. 19—, the said ——— of said ———, in open session, opened and examined all said proposals or bids, and publicly declared the same, and afterwards, to wit, on the —— day of ———, A. D. 19—, rejected all said proposals or bids other than the lowest regular proposal or bid of the responsible bidder, next herein mentioned, and by its resolution, Number ———, then and there passed by it, awarded the contract for said work or improvement to the lowest responsible bidder therefor, to wit: to ———, the plaintiff herein, and at the prices named in its proposal or bid on file and hereinbefore specified, which said award was approved by the ——— of said ——— on the —— day of ———, A. D. 19—.

12. That in the resolution last aforesaid, the said ——— of said ——— directed its clerk to post and publish notice of said award of contract in the manner next hereinafter described, and thereby caused due notice of the said award to plaintiff to be posted and kept posted conspicuously for five full days near the chamber door of said ———, to wit: from the —— day of ———, 19—, to the —— day of ———, 19—, both days included, and to be published for two days, to wit, on the —— and —— days of ———, 19—, in said ———, which was ——— newspaper, published and circulated in said ———, and designated by said ——— for that purpose, and that said notice was so posted, kept posted and published.

13. That the owners of three-fourths of the frontage of lots and lands upon the street whereon said work was to be done, or their agents, making oath that they were such owners or agents, did not, within ten days after the first posting and publication of said notice of award, elect to take said work and enter into a written contract to do the whole work at the price at which the same had been awarded.

14. That before executing said contract, and on the —— day of ————, 19—, said plaintiff filed with the superintendent of streets of said ——— a good and sufficient bond, executed and signed by said plaintiff and two sufficient sureties in the sum of ——— dollars (being not less than one-half of the total amount payable by the terms of said contract) and which bond was approved by the mayor of said city.

That said bond inured to the benefit of any and all persons, companies or corporations who should perform labor on or furnish materials to be used in the said work of improvement, and provided that if said plaintiff should fail to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, said sureties would pay the same to an amount not exceeding the sum specified in said bond.

That said sureties on said bond duly qualified before ————, who was then a notary public in and for the county of Alameda, state of California, competent to administer an oath, each in double the said amount and over and above all statutory exemptions.

15. That afterward and within fifteen days after the first posting and publication of said notice of award, to wit, on the —— day of ————, A. D. 19—, the superintendent of streets of said ———, in his official capacity, did then and at his office, and in pursuance of said award, enter into a written contract for said work with the plaintiff, who was the original bidder to whom said contract had been awarded and at the prices aforesaid specified in its bid, and

therein fixed the time for beginning said work to be on the —— day of ————, A. D. 19—, and the time for completing said work to be within ——— days thereafter; and wherein and whereby said plaintiff agreed that it would do and perform all said work according to the specifications therein and hereinbefore mentioned, and under the direction and to the satisfaction of said street superintendent and that the materials used should comply with the specifications and be to the satisfaction of said street superintendent; and said contract also contained express notice that in no case, except where it is otherwise provided in the act aforesaid, would the ——— or any officer thereof be liable for any portion of the expense or for any delinquency of persons or property assessed.

16. That previous to the execution of said contract, the plaintiff advanced to the superintendent of streets the sum of ——— dollars for payment by it of the cost of publication of the notices, resolutions, orders and all incidental expenses and matters required under the proceedings prescribed in said acts.

17. That at the time of entering into said contract the plaintiff also executed a good and sufficient bond of even date therewith, conditioned for the faithful performance of said contract, and said bond was to the satisfaction and approval of said street superintendent, with two sureties, and payable to said ——— in the sum of ——— dollars, which sum the ———— of said ——— deemed adequate therefor; and that the sureties thereon justified each before ————, who was then a notary public in and for said county of ———, and competent to administer an oath, in double the said amount mentioned therein over and above all statutory exemptions; and that said bond was duly received by said superintendent of streets, and filed in his office as a record.

18. That the plaintiff did and caused to be done all the work in said contract and specifications mentioned, and duly performed on its part in every respect the said work accord-

ing to the specifications and the terms of the contract with its extensions of time ——— and with materials complying with the specifications, all under the direction and to the satisfaction of said superintendent of streets; and that the said work was duly approved and accepted by said superintendent, who thereupon proceeded to make his assessment, Number ———, and therein to assess and apportion the expenses of all of said work performed and in said contract specified, with the incidental expenses, to wit: the total sum of ——— dollars ($———), upon the lots and lands fronting thereon, and liable to assessment therefor; each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expenses of the work; and that said assessment briefly referred to the contract, the work contracted for and performed, and showed the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, the amount of each assessment, the name of the owner of each lot, or portion of a lot assessed, if known to the street superintendent; but when the name was unknown to him, the word "unknown" was written opposite the number of the lot and the amount assessed thereon, the number of each lot, or portion or portions of the lot assessed, which assessment was signed by said street superintendent and had attached thereto a diagram, exhibiting each street and street crossing, lane, alley, place, or court on which any work had been done, and showing the relative location of each district, lot, or portion of lot to the work done, and numbered in red ink to correspond with the red ink numbers in the assessment, and showing the number of feet fronting, or number of lots assessed for said work contracted for and performed, which diagram was also signed by the street superintendent; and that to said assessment was also attached a warrant, which was signed by the superintendent of streets, and countersigned by the ——— of said ———; and that all of said assessment-roll was duly made in the manner and form prescribed by law.

19. The said warrant, assessment and diagram, together with the certificate of the ——— engineer mentioned in section 34 (subdivision first) of said acts, were duly made and recorded in the office of said superintendent of streets in a book kept by him for that purpose, to wit: Book ——— of street assessments of said ———, page ——— and following, and the record thereof was duly signed by said street superintendent in his official capacity; all of which things were done at the times and in the manner prescribed by said acts, and that prior thereto all the incidental expenses had been paid by the contractor.

20. That by and upon both said assessment and diagram, the lot and parcel of land hereinafter described was numbered in red ink as number ——— and was assessed on said assessment as the property of unknown owners.

21. That defendant ————, at and during all the time of taking the aforementioned proceedings, and particularly on the —— day of ————, A. D. 19—, w—— and still continue— to be the owner of part of the lots and lands assessed as aforesaid, and liable to assessment for the work done as aforesaid, that is to say, the said defendant ——— on the day last mentioned, w——, and ever since then ha—— been and ——— now the owner— in fee and in possession of, and ha—— claimed and exercised, and now claim— and exercise— acts of ownership over the following described lot— and parcel— of land— in said ——— of ————, county of Alameda, and state of California, said lot—, portion of lot—, and parcel— of land being adjacent to said work and fronting thereon, and liable to said assessment to cover the expenses of said work, to wit: ————

That by and according to said assessment and diagram, and numbered upon each of them in red ink as ———, said lot ——— in block ——— above described, was assessed as aforesaid to pay the sum of ——— dollars ($———)

for frontage work, rated at $——— per front foot on ——— front feet; and the further sum of ——— dollars ($———) for ——— street termination work rated at $——— per front foot on ——— front feet; and the further sum of ——— dollars ($———) for work opposite the termination of ——— street, rated at $——— per front foot on ——— front feet; and the further sum of ——— dollars ($———) for work upon the crossing of ——— street, rated at $——— per front foot on ——— front feet.

22. That on the —— day of ————, A. D. 19—, the said street superintendent issued and delivered said warrant with said assessment certificate, and diagram attached, to the said contractor, to wit, the plaintiff, all which instruments were dated on the day last aforesaid, and had been recorded and certified on each as recorded by said street superintendent; and by virtue of said warrant said contractor, its agents and assigns were authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in said contract and assessment.

23. That afterward, and within thirty days after the date of said warrant, ————, who then and at all times hereinafter mentioned was the duly authorized agent of the plaintiff, in behalf of plaintiff, called upon the persons assessed and demanded payment of the several amounts assessed to each, and whenever the person so assessed or their agents could not conveniently be found, or whenever the name of the owner of the lot was stated as "unknown" on the assessment, then the said ————, on behalf of plaintiff, did publicly demand payment on the premises assessed, for each of the exact amounts separately assessed against said lot— or parcel— of land.

24. That on the —— day of ————, A. D. 19—, and within thirty days after the date of said warrant, the said ————, in said capacity and behalf, did by virtue of said warrant, assessment, certificate and diagram, call upon defendant, ————, and demand from him payment of each

of said amounts so separately assessed upon the said lot— or parcel— of land hereinbefore described, amounting in the aggregate to ——— dollars ($———); and also did publicly, between the hours of ——— A. M., and ——— P. M., on the —— day of ————, A. D. 19—, enter upon and demand payment on the premises assessed for each of the exact amounts so assessed against said lot— or parcel— of land, hereinbefore specified and described, from the unknown owner or owners thereof, all of said lot and parcel of land having been separately assessed to unknown owners; and said several assessments so separately demanded amounted in the aggregate to the sum of ——— dollars ($———).

25. That said defendants, though demand has been made as aforesaid for the payment of the said several amounts so separately assessed as aforesaid, and hereinbefore specifically set forth, amounting in the aggregate to ——— dollars ($———), have not paid the same or any part thereof, but have refused and still do refuse to pay the same or any part thereof; and that the same remains due to plaintiff, and unpaid, although often demanded by it, together with interest thereon at the rate of ten per centum per annum from the —— day of ————, A. D. 19—.

26. That afterward, to wit, on the —— day of ————, A. D. 19—, and within thirty days after the date of the warrant, the said ————, in said capacity and behalf, did return said warrant, assessment, certificate and diagram to the said street superintendent at his office, with a return indorsed upon said warrant, signed by said ————, agent of and in behalf of plaintiff, and verified by his oath duly administered by a competent person, which return stated the nature and character of the demand, how and when and upon whom, or by its number upon what lot made, and whether any of the assessments remained unpaid, in whole or in part, and the amount thereof; and that thereupon the said street superintendent did record the said return in the margin of the record of the warrant and assessment, and

also the original contract referred to therein all at full length, in the books kept by him for that purpose in his office, and thereupon signed the said record; all of which acts were done at the times and in the manner prescribed by said acts.

27. That more than thirty days have elapsed after the date of said warrant, and no person in interest or at all has appealed to the ——— of said ——— in the manner prescribed by said acts, or at all, on account of any act or determination of the street superintendent in relation thereto, or of the mode of performing the work, or objecting to the correctness or legality of the assessment, or act or proceeding of said street superintendent, or on account of any error, informality, irregularity or other defect in any of the proceedings prior to the assessment, or in the assessment itself.

That each and every ordinance, resolution, order, act, judgment or determination hereinbefore alleged, of the said ——— or said street superintendent, or said ——— engineer, was duly given and made.

That the plaintiff, by virtue of the said acts, and by reason of the warrant, assessment, certificate and diagram, and of the various acts done as aforesaid, has and holds a lien upon the lot and parcel of land above described and alleged to have been separately assessed as aforesaid, to secure the said several sums of money so separately assessed against the said lot— and parcel— of land, and the unknown owners thereof, as above set forth, and that the sums are, by the statutes in such cases made and provided, due and payable.

That defendants ———, each have or claim to have some separate interest in or lien upon said assessed and described lot and land by way of mortgage or otherwise, which separate interest or lien, if any, is inferior and subject to the lien of the plaintiff.

That defendants, John Doe, Richard Roe, and ——— each have or claim to have some separate interest in or lien upon said assessed and described lots and lands, ———,

which separate interest or lien, if any, is inferior and subject to the lien of the plaintiff, and that said names are fictitious, and are used to designate defendants, whose true names are unknown to the plaintiff, and which, when discovered by it, will, by leave of the court, be inserted in this complaint, with apt and proper words to charge the same.

That at all the times herein mentioned, the plaintiff, ———— was and now is a corporation formed A. D. 19—, under the laws of the state of California, and then had and now has its office and principal place of business in the city of Oakland, in the county of Alameda, state of California.

Wherefore plaintiff brings this suit and demands judgment:

1. For the full sum of ——— dollars ($———), the same being the aggregate amount of the said several sums of money as particularly set forth above, and separately assessed as aforesaid, upon the said lot and parcel of lands above particularly described, and alleged to have been separately assessed to unknown owners, together with interest thereon at the rate of ten per centum per annum from the —— day ————, A. D. 19—, and that the said several sums, separately assessed as aforesaid, be each adjudged to be a lien upon the said lot— and parcel— of land for the payment of the amounts for which said lot— and parcel— of land has been assessed as aforesaid; and that said lot— and parcel— of land, assessed as aforesaid, be adjudged and decreed to be liable for the payment of the said sums so assessed thereon, with interest as aforesaid, and for costs of suit, and for fifteen dollars as attorney's fees.

2. That a decree in due form be made foreclosing said lien and for the sale of said premises, in this complaint described, by the sheriff of Alameda county, according to law and the practice of this court, and that the proceeds of said sale be applied to the payment of the amounts due to the plaintiff as aforesaid and in said order after the payment of the sheriff's expenses of sale and fees; that said defendants, and all persons claiming under or through them

or any of them as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in said premises and every part thereof; that the plaintiff or any other person or party to this suit may become a purchaser at said sale; that the sheriff execute a deed to the purchaser, and that the purchaser be let into the possession of the said premises on the production of the said sheriff's deed therefor; and that the plaintiff may have such other and further orders, judgment and relief in the premises as the case may require, and as to the court may seem just and equitable, together with its costs in this behalf expended.

_____,

Attorneys for Plaintiff.

State of California,
County of Alameda,—ss.

_____, being duly sworn, says that he is _____, plaintiff in the above-entitled action, and makes this verification for and in behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

_____.

Subscribed and sworn to before me this —— day of _____, A. D. 19—.

[Seal] _____,

Notary Public in and for the County of Alameda, State of California.

§ 1026. Lis Pendens.

[Title of Court and Cause.]

Notice is hereby given that an action has been commenced in the Superior Court of the state of California, in and for the county of Alameda, by the above-named plaintiff against the above-named defendants for the foreclosure of liens aris-

ing upon street assessments for sidewalking McGee avenue between Dwight Way and Oregon street in the town of Berkeley, county of Alameda, state of California, and that the premises affected by this suit are situated in said town of Berkeley and are described as follows, to wit:

Lot 5 in Block 4 of the State University Homestead Association No. 3 Tract, as per map of said tract of record in the office of the county recorder of said Alameda county.

Dated ———.

———,

Attorney for Plaintiff.

CHAPTER II.

FORMS UNDER THE BOND ACT.

§ 1027. In general.
§ 1028. Resolution directing estimates.
§ 1029. Estimate of cost.
§ 1030. Resolution adopting plans and specifications.
§ 1031. Resolution of intention.
§ 1032. Warrant.

§ 1027. **In General.**—The forms used under the Bond Act are, with a few additions, the same as those required under the Vrooman Act. The form of bond is contained in section 4 of the act, and need not be repeated here. I have not repeated the forms which merely require the addition of a description of the bonds, nor those which are identical with the Vrooman Act forms. All of the forms given in this chapter have been used in the city of Oakland.

§ 1028. Resolution Directing Estimates, etc.

Resolved, that the city engineer is hereby directed to furnish to this council plans, specifications and estimates of costs of grading, curbing and guttering with concrete, paving with asphalt upon a concrete foundation and otherwise improving Grove street (excepting such portions thereof as are required by law to be kept in order or repair by any person or company having railway tracks thereon) from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street, for the purpose of enabling this council to determine whether bonds may be issued to represent the cost thereof.

§ 1029. Estimate of Cost.

To the Honorable, the Council of the City of Oakland.

Gentlemen: In compliance with your Resolution No. 33,680, I submit herewith, plans, specifications and estimates of costs of grading, curbing and guttering with concrete,

paving with asphalt upon a concrete foundation and otherwise improving Grove street (excepting such portions thereof as are required by law to be kept in order or repair by any person or company having railroad tracks thereon) from the eastern line of San Pablo avenue to the northern line of Thirty-sixth street.

Total estimated cost	$69,500 00
Estimated cost per front foot along each line of the street, excluding the cost of intersection work assessable upon said frontage	$5 50
Estimated cost per front foot along each line of the street for intersection work assessable upon said frontage	50
Total estimated cost per front foot along each line of the street	$6 00

F. C. TURNER,
City Engineer.

§ 1030. Resolution Adopting Plans and Specifications.

Resolved, that the plans and specifications submitted by the city engineer of the city of Oakland and filed in the office of the clerk of the council of said city, on April 6, 1908, for the paving and otherwise improving of Grove street from San Pablo avenue to the northern line of Thirty-sixth street, said work to be done in accordance with an act of the legislature providing a system of street improvement bonds, etc., approved February 27, 1893, and all acts amendatory thereto, be and the same are hereby adopted as the plans and specifications according to which said work shall be done.

§ 1031. Resolution of Intention.[1]

Resolved, that it is the intention of the council of the city of Oakland to order the following street work to be done, to wit:

[1] See ante, sec. 392. As originally passed, this resolution contained a finding as to cost, which is no longer necessary.

That Grove street in said city, from the eastern line of San Pable avenue to the northern line of Thirty-sixth street, be graded, curbed with concrete and paved with asphalt;

Excepting, however, from all of the before described work, such portions as are required by law to be kept in repair by any person or company having railroad tracks thereon;

Also excepting from the before described work, the grading of the sidewalks.

All of the before described work shall be done in accordance with the plans, profiles and specifications made therefor by the city engineer of the city of Oakland (which specifications are marked "Specifications for the improvement of Grove street, between the eastern line of San Pablo avenue and the northern line of Thirty-sixth street, all in the city of Oakland, county of Alameda, state of California"), in accordance with and as directed by Resolution No. 33,680 of this city council, which plans, profiles and specifications were filed in the office of the city clerk of the city of Oakland on the sixth day of April, 1908, and which plans, profiles and specifications were adopted by Resolution No. 33,771 of this city council as the plans, profiles and specifications, according to which said work should be done.

It is hereby determined, in pursuance of an act of the legislature of the state of California entitled, "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 27, 1893, as thereafter amended, that bonds shall be issued to represent the cost of said improvement. Said bonds shall be serial, extending over a period of ten years, an even proportion of the principal sum of which shall be payable annually, on the second day of January of each year, by coupon, after their date, until the whole are paid, and to bear interest at the rate of six per cent per annum, payable semi-annually, by coupon, on the second day of January and July respectively, of each and every year.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper and to post the same for two days conspicuously on or near the chamber door of this council.

§ 1032. Warrant.[2]

By virtue hereof, I, Walter C. Howe, superintendent of streets of the city of Oakland, county of Alameda, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower the Barber Asphalt Paving Company, its agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be its warrant for the same.

Serial bonds will be issued, bearing interest at the rate of six per cent per annum and extending over a period of ten years from their date of issue, to represent the cost and expenses of the work described in the assessment and in the manner and form prescribed by law, and notice is hereby given that a bond in such series will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of this warrant or five days after the decision of the city council of this city upon an appeal.

Oakland, Cal., December 29, 1908.

WALTER C. HOWE,
Superintendent of Streets of the City of Oakland.

Countersigned by

FRANK K. MOTT,
Mayor of the City of Oakland.

Recorded December 29, 1908.

WALTER C. HOWE,
Superintendent of Streets of the City of Oakland.

[2] See ante, sec. 395.

CHAPTER III.

FORMS UNDER THE LOCAL IMPROVEMENT ACT OF 1901.

§ 1033. Resolution referring work to city engineer.
§ 1034. Engineer's report.
§ 1035. Resolution adopting report.
§ 1036. Notice of local improvement.
§ 1037. Order establishing notice.
§ 1038. Objections.
§ 1039. Resolution confirming resolution adopting report.
§ 1040. Notice of sale.
§ 1041. Owner's waiver and agreement.
§ 1042. Tax collector's report.
§ 1043. Resolution directing notice calling for bids.
§ 1044. Notice calling for bids.

§ 1033. Resolution Referring Work to City Engineer.[1]

Whereas, in the opinion of the city council, the public interest and convenience require that Ninth street in the city of Oakland, from the western line of Oak street to the eastern line of Webster street be paved with asphalt, and that the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor as shall be approved by the city council, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for the period of five years from the date of the acceptance thereof; and that proceedings for said work and improvement be conducted in accordance with the terms of an act of the legislature of the state of California known as the Local Improvement Act of 1901; now, therefore, be it

Resolved, that said proposed work is hereby referred to the city engineer of the city of Oakland, who is hereby in-

[1] See ante, sec. 519.

structed to make to the city council a report in writing, containing his recommendations as to the best method of doing said work and of making said improvement, to which report he is instructed to attach the following exhibits:

1. A description of the work to be done;

2. A description of the exterior boundaries of the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof;

3. Plans, profiles, cross-sections and specifications of the work required in order to accomplish said improvement;

4. An estimate of the expense of said improvements, deducting therefrom the estimated cost of so much, if any, of said improvements as may be by law required to be done by railroads having tracks upon the streets affected;

5. A map showing the district above referred to, and also the subdivisions of the property within said district, as ascertained by said engineer, each of which subdivisions shall be given upon said map a separate number in red ink;

6. A list referring to the said subdivisions upon said map by the respective red ink numbers thereof, and showing the names of the owners, if known, otherwise designating them as unknown, and the valuations of said respective subdivisions, as the same appear upon the last assessment-roll of said municipality, if they so appear, otherwise as estimated by said engineer, also the dimensions, areas, and his estimates of the benefits which the respective parcels will receive from said improvement;

7. An estimate of all incidental expenses likely to be incurred in connection with the work, such as clerical, engineering, inspection, printing and advertising.

§ 1034. Engineer's Report.[2]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore adopted a resolution, No. ———, referring to me the proposed work of paving with asphalt Ninth street in the city

[2] See ante, sec. 520 ff.

of Oakland from the western line of Oak street to the eastern line of Webster street, and instructing me to make a report in writing containing my recommendations as to the best method of doing said work and of making said improvement, which work is to be done in accordance with the provisions of an act of the legislature of the state of California known as the "Local Improvement Act of 1901," I, John Doe, city engineer of the city of Oakland, in obedience to said resolution, submit herewith the following report:

I have attached hereto the exhibits required by your said resolution, which I have marked respectively Exhibits 1, 2, 3, 4, 5, 6, 7, and which are hereby referred to and made parts of this report.

Exhibit 1 contains a description of the work to be done.

Exhibit 2 contains a description of the exterior boundaries of the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof.

Exhibit 3 contains plans, profiles, cross-sections and specifications of the work required in order to accomplish said improvement.

Exhibit 4 contains an estimate of the expenses of said improvement. No part of said improvement is by law required to be done by any railroad, no railroads having tracks upon the streets affected.

Exhibit 5 contains a map showing the district described in Exhibit 2, and also the subdivisions of the property within said district as ascertained by me, each of which subdivisions is given upon said map a separate number in red ink.

Exhibit 6 is as follows:

In the first column thereof, under the title "Lot Number," is set forth a list of the lots and subdivisions within the assessment district above referred to, as said lots and subdivisions are shown upon the map contained in Exhibit 5, by the respective red ink numbers thereof.

In the second column, under the title of "Names of Owners," is set forth opposite each number of a lot or subdivision the name of the owner thereof if known, otherwise the word "Unknown."

In the third column, under the title "Valuations," is set forth opposite the number of each lot and subdivision the valuation of the same as it appears upon the last assessment-roll of the city of Oakland, if it so appears; otherwise, as estimated by me, in which cases I have placed the letters "est." in said column.

In the fourth column, under the title "Dimensions," is set forth opposite the number of each lot and subdivision the dimensions of the same in feet.

In the fifth column, under the title "Area," is set forth opposite the number of each lot and subdivision the area of the same in square feet.

In the sixth column, under the title of "Estimate of Benefits," is set forth opposite the number of each lot and subdivision an estimate of the benefit which such parcel will receive from said improvement.

Exhibit 7 contains an estimate of all incidental expenses likely to be incurred in connection with the work, such as clerical, engineering, inspection, printing and advertising.

Wherever the abbreviations hereinafter set forth in this report or in any of the exhibits hereto annexed are used they are defined to mean as follows:

No. means number; amt. means amount; dolls. means dollars; cts. means cents; n. means north, northern or northerly; s. means south, southern, or southerly; e. means east, eastern or easterly; w. means west, western or westerly; n. w. means northwest, northwestern or northwesterly; n. e. means northeast, northeastern or northeasterly; s. e. means southeast, southeastern or southeasterly; s. w. means southwest, southwestern or southwesterly; ft. means feet; in. means inches; sq. ft. means square feet; com. means commencing or commencement; beg. means beginning; tr. means tract; blk. means block.

Wherever the character "$" is used it means dollars.

I hereby recommend that the work be done and an assessment therefor levied in accordance with the provisions of this report.

Oakland, Cal., ————, 1911.

JOHN DOE,
City Engineer of the City of Oakland.

EXHIBIT 1.

Description of the Work to be Done.

The following is a description of the work to be done:

That Ninth street in the city of Oakland from the western line of Oak street to the eastern line of Webster street be paved with asphalt; that said work be done in all respects in accordance with the plans, profiles, cross-sections and specifications therefor prepared by the city engineer of the city of Oakland, marked Exhibit 3, and annexed to his report to the city council as to the best method of doing said work and making said improvement; and also in pursuance of an act of the legislature of the state of California known as the "Local Improvement Act of 1901."

That the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor, as shall be approved by the city council, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for the period of five years from the date of the acceptance thereof.

EXHIBIT 2.

Description of District.

The following is a description of the exterior boundaries of the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof:

All that certain land situate in the city of Oakland, county of Alameda, state of California, described as follows:

Commencing at the point of intersection of the western line of Oak street with the southern line of Tenth street, and running thence westerly along said line of Tenth street to the eastern line of Webster street; thence southerly along said line of Webster street to the northern line of Eighth street; thence easterly along said line of Eighth street to the western line of Oak street; and thence northerly along said line of Oak street to the point of beginning; saving, excepting and excluding from said district all public streets, avenues, lanes, alleys, courts, and places therein included and contained.

EXHIBIT 4.

The following is an estimate of the expense of said improvement:

Estimated cost of the work	$30,000 00
Estimated incidental expenses (as itemized in Exhibit 7)	1,000 00
Estimated total cost	$31,000 00

There are no railroad tracks upon the streets affected; and therefore no part of the improvement is required by law to be done by any railroad or railroads.

EXHIBIT 6.

Lot No.	Names of Owners	Valuations	Dimensions	Area Sq. Feet	Estimate of Benefits
1	Unknown	$10,000	Rectangular Lot, 50 foot frontage on Ninth street by 100 feet deep.	5,000	$250 00
2	Unknown	Est. $15,000	Rectangular Lot, 75 foot frontage on Ninth street by 100 feet deep.	7,500	$375 00

EXHIBIT 7.

The following is an estimate of all incidental expenses likely to be incurred in connection with the work, such as clerical, engineering, inspection, printing and advertising:

Clerical work	$100 00
Engineering	200 00
Inspection	300 00
Printing and advertising	400 00
Total estimated incidental expenses	$1,000 00

§ 1035. **Resolution Adopting Report.**[8]

Whereas, the city engineer of the city of Oakland did on the —— day of ————, 1911, pursuant to Resolution No. —— of this council, file with the city clerk his report in writing containing his recommendations as to the best methods of doing the work and making the improvement referred to in said resolution, and described in said report as follows, to wit: That Ninth street from the western line of Oak street to the eastern line of Webster street be paved with asphalt; that said work be done in all respects in accordance with the plans, profiles, cross-sections and specifications therefor prepared by the city engineer of the city of Oakland, marked Exhibit 3 and annexed to his report to the city council as to the best method of doing said work and making the said improvement; and also in pursuance of an act of the legislature of the state of California known as the "Local Improvement Act of 1901"; that the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor, as shall be approved by the city council, conditioned that the said contractor shall maintain free and clear from all defects, except such as may result from ordinary wear and tear, the work

[8] See ante, secs. 525–527.

contracted for and performed, for the period of five years from the date thereof; and

Whereas the city council has considered said report; now therefore be it

Resolved, that said report as filed by said city engineer be and the same is hereby adopted; and an assessment is hereby levied upon the lands and subdivisions of land shown on the map of the district benefited by said improvement contained in Exhibit 5 attached to said report, each of which subdivisions is given upon said map a separate number in red ink, in and to the amount of the benefits which each of said lots will receive from said improvement, which amounts are estimated and set forth in Exhibit 6 attached to said report, which estimates are hereby adopted as and determined to be the amounts of benefits such lots will receive respectively from said improvement, and which district is hereinafter described, but said assessment shall not constitute a lien upon the property until all persons interested have had an opportunity to be heard, as hereinafter provided.

And this council hereby determines:

1. That the rate of interest to be charged upon deferred payments shall be six per cent per annum.

2. That the time to be allowed upon deferred payments shall be nine years, said payments to be made in ten yearly installments, the first of which shall be paid at the time an agreement for such payments is filed, and the others annually thereafter.

3. That the rate of interest to be allowed upon bonds issued to cover deferred payments shall be five per cent per annum.

4. That the time for which bonds issued to cover deferred payments are to run shall be nine years from the date of issuance.

5. That ——— the ——— of ———, at the hour of ——— o'clock P. M., at the council chamber in the City Hall of the city of Oakland be and the same are hereby fixed as the

time and place when and where any and all persons may appear before this council to show cause, if any they have, why said improvement provided for in said report and in this resolution should not be carried out in accordance herewith;

6. That the following is a description of the exterior boundaries of the district hereby declared by the city council to be benefited by the proposed improvement and to be assessed to pay the costs and expenses thereof:

All those certain parcels of land situate in the city of Oakland, county of Alameda, state of California, described as follows:

Commencing at the point of intersection of the western line of Oak street with the southern line of Tenth street, and running thence westerly along said line of Tenth street to the eastern line of Webster street; thence southerly along said line of Webster street to the northern line of Eighth street; thence easterly along said line of Eighth street to the western line of Oak street; and thence northerly along said line of Oak street to the point of beginning; saving, excepting and excluding therefrom all public streets, avenues, lanes, alleys, courts, and places therein included and contained.

7. That the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor as shall be approved by this city council, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for the period of five years from the date of acceptance thereof.

8. The city clerk is hereby directed to post conspicuously in three of the most public places within the city of Oakland, and also along the street frontages of all the real property within the district herein described, at not more than one hundred feet in distance apart, notices of the hearing herein

provided for. Said notices shall be headed "Notice of Local Improvement," in letters of not less than one inch in length, and shall in legible characters state the fact of the passage of this resolution, and briefly describe the work of improvement proposed, and refer to this resolution for further particulars; said notice shall also state the date, hour and place for which the hearing herein provided for has been set, and shall notify all parties interested in any real estate within the limits of said district then and there to show cause, if any they have, why said improvement proposed in this resolution should not be carried out in accordance herewith; said notice shall also contain a description of the district covered by this resolution by the exterior boundaries thereof, said description to be in bold-faced type; said notices shall be posted at least twenty days before the time set for the hearing; and the said city clerk is further directed to publish said notice twice in the Oakland "Enquirer," a daily newspaper printed, published and circulated in the city of Oakland and hereby designated for the purpose, at least ten days before the date of hearing.

§ 1036. Notice of Local Improvement.[4]

NOTICE OF LOCAL IMPROVEMENT.

Notice is hereby given that on the —— day of ————, 1911, the city council of the city of Oakland passed and adopted a resolution, No. ———, adopting the report of the city engineer of the said city, containing his recommendations as to the best method of doing the work and making the improvement described as follows, to wit:

That Ninth street from the western line of Oak street to the eastern line of Webster street be paved with asphalt; that said work be done in all respects in accordance with the plans, profiles, cross-sections and specifications therefor prepared by the city engineer of the city of Oakland, marked Exhibit 3, and annexed to his report to the city council as

[4] See ante, sec. 528.

to the best method of doing said work and making the said improvement; and also in pursuance of an act of the legislature of the state of California known as the "Local Improvement Act of 1901"; that the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor, as shall be approved by the city council, conditioned that the said contractor shall maintain free and clear from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed, for the period of five years from the date thereof;

That the following is a description of the district covered by said resolution by the exterior boundaries thereof, which district is declared to be the district benefited by said improvement and to be assessed to pay the costs and expenses thereof:

All that certain land situate in the city of Oakland, county of Alameda, state of California, described as follows: Commencing at the point of intersection of the western line of Oak street with the southern line of Tenth street, and, running thence westerly along said line of Tenth street to the eastern line of Webster street; thence southerly along said line of Webster street to the northern line of Eighth street; thence easterly along said line of Eighth street to the western line of Oak street; and thence northerly along said line of Oak street to the point of beginning; saving, excepting and excluding from said district all public streets, avenues, lanes, alleys, courts and places therein included and contained.

That ——— the —— day of ————, 1911, at the hour of —— o'clock P. M., at the council chamber in the City Hall of the city of Oakland, have been fixed as the time and place when and where any and all persons may appear before the city council of said city to show cause, if any they have, why said improvement provided for in said report

and in said resolution should not be carried out in accordance therewith; and all parties interested in any real estate within the limits of the district above described are notified then and there to show cause, if any they have, why said improvement proposed in said report and said resolution should not be carried out in accordance therewith. For further particulars reference is hereby made to said resolution on file in the office of the city clerk of the city of Oakland.

By order of the city council of the city of Oakland.

Oakland, Cal., ————.

JOHN DOE,
City Clerk of the City of Oakland.

§ 1037. Order Establishing Notice.[5]

Whereas, it appears to the satisfaction of the city council of the city of Oakland from an affidavit on file that notices of the hearing provided for in Resolution No. ——— of this council, passed ————, containing the matters specified in said resolution, have been posted conspicuously in three of the most public places within the city of Oakland, and also along the street frontages of all the real property within the district in said resolution described, at not more than one hundred feet in distance apart, and that said notices were so posted at least twenty days before the time set for hearing; and

Whereas, it further appears from an affidivit on file that said notice was published twice in the Oakland "Enquirer," the daily newspaper printed, published and circulated in the said city of Oakland and designated for the purpose by said resolution, at least ten days before the date of hearing; now, therefore, be it

Resolved, and the city council does hereby make its finding and order, that notice of said hearing has been posted and published according to law.

[5] See ante, secs. 530, 531.

§ 1038. Objection.[6]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: I, John Brown, do hereby object to and protest against the making of the improvement provided for by your resolution No. ———, passed ————, and for ground of objection state:

That I am the owner of all that certain lot, piece or parcel of land situate, lying and being in the city of Oakland, county of Alameda, state of California, particularly described as follows:

Commencing at a point formed by the intersection of the western line of Harrison street with the southern line of Tenth street, and running thence westerly along said line of Tenth street twenty-five (25) feet; thence at right angles southerly one hundred (100) feet; thence at right angles easterly twenty-five (25) feet to the western line of Harrison street; and thence northerly along said line of Harrison street one hundred (100) feet to the point of beginning.

That the nature of my title to said real property is that of owner;

That I object to and protest against said improvement upon the following grounds:

1. That property on Tenth street will not be benefited by the work upon Ninth street, and that therefore the assessment district should not include property fronting on Tenth street.

2. That there is already a rock pavement on Ninth street, and that it is in good condition; and that therefore the work proposed is not necessary.

Wherefore, I object to said proposed improvement and pray that no further proceedings be taken in the matter.

JOHN BROWN.

State of California,
County of Alameda,—ss.

John Brown, being duly sworn, deposes and says that he is the protestant named in the above and foregoing protest;

[6] See ante, sec. 533.

that he has read the foregoing protest and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

JOHN BROWN.

Subscribed and sworn to before me this —— day of ————, A. D. 1911.

————————,

Notary Public in and for the County of Alameda, State of California.

§ 1039. Resolution Confirming Resolution Adopting Report.[7]

Whereas, this council did on the —— day of ————, 1911, pass a resolution, No. ———, adopting the report of the city engineer containing his recommendations as to the best methods of doing the work and making the improvement therein described, to wit:

That Ninth street from the western line of Oak street to the eastern line of Webster street be paved with asphalt; that said work be done in all respects in accordance with the plans, profiles, cross-sections and specifications therefor prepared by the city engineer of the city of Oakland marked Exhibit 3 and annexed to his report to the city council as to the best method of doing said work and making the said improvement; and also in pursuance of an act of the legislature of the state of California known as the "Local Improvement Act of 1901"; that the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor, as shall be approved by the city council, conditioned that the said contractor shall maintain free and clear from all defects, except such as may result from ordinary wear and tear, the work contracted

[7] See ante, sec. 533.

for and performed, for the period of five years from the date thereof; and

Whereas, a hearing has been had upon all objections filed, at the time and place fixed in said resolution therefor, and said hearing is now closed; now therefore be it

Resolved, that all objections filed in said matter be and the same are hereby overruled; and be it further

Resolved, that said resolution be and the same is hereby confirmed, and that the work therein described be and the same is hereby ordered.

§ 1040. Notice of Sale.[8]

NOTICE OF SALE FOR NONPAYMENT OF ASSESSMENTS.

Public notice is hereby given that default having been made in the payment of the several sums due upon the real property hereinafter described and assessed thereon for the cost and expenses of the improvement of Ninth street in the city of Oakland, from the eastern line of Oak street to the western line of Webster street, in accordance with Resolution No. ——— of the city council of the city of Oakland, adopted on the —— day of ————, 1911, as finally confirmed by said city council by a resolution, No. ———, adopted on the —— day of ————, 1911;

Now, therefore, I, Henry White, tax collector of the city of Oakland, will, on ———, the —— day of ————, 1911, at my office in the City Hall of the city of Oakland, sell the respective parcels of land hereinafter described, or so much of each parcel as shall be necessary to realize the amount assessed against said parcel and its proportion of the costs and expenses of sale, in the order of their numbers on the map hereinafter referred to, within said district, the assessments against which shall not have been paid or bonded against as provided by an act of the legislature of the state of California known as the "Local Improvement

[8] See ante, sec. 539.

Act of 1901," at or before the time of sale fixed herein, and that I will sell the smallest quantity of each lot, piece or parcel of said land that will be taken by any person for the amount of the assessment thereon and its proportion of the expenses of sale.

Conditions: Real property will be sold subject to redemption within one year after the sale by the payment to the tax collector of the amount for which the property was sold, with an additional penalty of twenty-five per cent of the amount for which the same was sold; but if not so redeemed a deed of the property sold will be made to the purchaser or his assignee at the expiration of said one year.

The numbers in the first column below denote the several lots, pieces or parcels of land designated by the corresponding red ink numbers upon that certain map entitled, "Map of the District Benefited by the Improvement of Ninth Street from the Western Line of Oak Street to the Eastern Line of Webster Street, Made by the City Engineer of the City of Oakland, Pursuant to Resolution No. ——— of the City Council," and recorded in my office, and are respectively the descriptive numbers of each lot, piece or parcel of land upon which said assessment is delinquent.

The names following said numbers are the names of the persons designated in the report of the city engineer, made pursuant to Resolution No. ———, to the city council of the city of Oakland, as the owners of the respective parcels of land immediately preceding said names respectively, and where not known are designated as "unknown"; and the figures following each name and respectively preceded by the sign or abbreviation "$" denotes dollar or dollars, and the last two figures of each amount set after, opposite and following each name respectively denote cents, and said amounts are the amounts of the assessments upon each of said parcels respectively.

Number.	Name.	Amount.
1	William Smith.	$25 00
5	George Green.	$25 00

Oakland, Cal., ————, 1911.

HENRY WHITE,
Tax Collector, Oakland, Cal.

§ 1041. Owner's Waiver and Agreement.[9]

This agreement made at the city of Oakland, this —— day of ————, 1911, by and between ———— of said city, the party of the first part, and the city of Oakland, a municipal corporation organized and existing under and by virtue of the laws of the state of California, the party of the second part, witnesseth:

That whereas the city council of the city of Oakland has under and by virtue of an act of the legislature of the state of California, known as the "Local Improvement Act of 1901," levied an assessment upon the real property hereinafter described in the sum of $————, for the paving of Ninth street in said city from the eastern line of Oak street to the western line of Webster street with asphalt and for the other work described in Resolution No. ——— of said city council, passed on the —— day of ————, 1911; and

Whereas, the said assessment is unpaid, and the tax collector of said city, pursuant to the terms of said act, has given notice that at a time and place fixed by him said property will be sold to satisfy said assessment; and

Whereas, the party of the first part desires to take advantage of the provisions of said act as to extension of time and payment of assessments in installments; and

Whereas, the party of the first part is the owner of the real property above referred to and which is situated in said city of Oakland, and is particularly described as lot No. ten (10) in block No. 150, as said lot and block are

[9] See ante, sec. 540.

delineated and so designated on Kellersberger's map of Oakland on file in the office of the county recorder of the county of Alameda, and which real property is given the number 25 in red ink upon the map accompanying the report of the city engineer to the city council of said city relating to said improvement;

Now, therefore, the party of the first part, for the purpose of taking advantage of the provisions of said act as to extensions of time and the payment of assessments in installments, and in consideration of an extension of time of payment of the assessment above referred to in accordance with the terms of said act, hereby promises and agrees to and with the party of the second part as follows:

1. The party of the first part expressly waives all objections, of whatsoever kind or nature, against the assessment above referred to and all proceedings with reference to the same.

2. The party of the first part undertakes and agrees to pay to the party of the second part the assessment above referred to on his parcel of land above described in ten equal yearly installments of $——— each, the first of which shall be paid at the time this agreement is filed, and the others annually thereafter, one each year, at the time when the first installment of municipal taxes within the city of Oakland is payable, with interest on all deferred payments at the rate of ——— per cent per annum, payable at the same time as the installments of principal.

3. In case of default in payment of any installment of principal provided for herein, or interest accrued on deferred payments, at the time called for by this agreement, then, and in that event, the entire remaining unpaid installments shall become immediately due and payable, and the tax collector of the city of Oakland may then forthwith, upon twelve days' written notice, mailed to the last known address of the party of the first part, sell the property herein described to realize the entire unpaid balance of said installments, with accrued interest and costs of sale; pro-

vided, the same have not been paid before the expiration of said twelve days.

It is understood and agreed that the entire unpaid balance may be paid at any time before maturity, together with interest on all deferred payments until the date of maturity of the installment of principal next falling due.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and the year first herein written.

——————— [Seal]

§ 1042. Tax Collector's Report.

To the Honorable, the City Council of the City of Oakland:

Gentlemen: I submit herewith the following report of the amount of cash collections and the amount of installment agreements taken for the improvement of Ninth street from the western line of Oak street to the eastern line of Webster street, as provided by your resolution No. ———, approved by your resolution No. ———.

Amount of cash collections.....$26,000
Amount of installment agreements taken.....$ 5,000

I further report that all sales required by law to be made in said matter have been made.

Respectfully submitted,

HENRY WHITE,
Tax Collector of the City of Oakland.

§ 1043. Resolution Directing Notice Calling for Bids.

Whereas, the funds for the improvement of Ninth street from the western line of Oak street to the eastern line of Webster street, pursuant to Resolution No. ——— of this council, confirmed by Resolution No. ——— of this council, are now actually in the hands of the city treasurer; now, therefore, be it

Resolved, that the city clerk is hereby directed to publish notice calling for bids to do said work in the Oakland "Enquirer," a newspaper of general circulation, printed,

published and circulated within the city of Oakland, and hereby designated for the purpose, for two insertions a week apart. Said notice shall conform in all respects to an act of the legislature of the state of California, known as the "Local Improvement Act of 1901," and shall require the filing of bids on or before the —— day of ————, 19—.

§ 1044. Notice Calling for Bids.[10]

NOTICE CALLING FOR STREET WORK PROPOSALS.

Pursuant to Resolution No. ——— of the council of the city of Oakland, adopted ————, 1911, directing this notice, said city council invites sealed proposals or bids for the following street work:

That Ninth street in the city of Oakland from the western line of Oak street to the eastern line of Webster street be paved with asphalt; that said work be done in all respects in accordance with the plans, profiles, cross-sections and specifications therefor prepared by the city engineer of the city of Oakland, marked Exhibit 3, and annexed to his report to the city council as to the best method of doing said work and making said improvement; and also in pursuance of an act of the legislature of the state of California known as the "Local Improvement Act of 1901."

That the contractor to whom the work is awarded shall furnish the city with a bond in the sum of ten thousand dollars with such responsible surety corporation (legally qualified to carry on business in the state of California) as guarantor, as shall be approved by the city council, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for the period of five years from the date of the acceptance thereof.

Said sealed proposals or bids are to be delivered to the undersigned, clerk of said city and clerk of said city council, at his office in the City Hall of the city of Oakland, on or

[10] See ante, sec. 555.

before 5 o'clock P. M. on ———, the —— day of ————, 1911. Bidders must file with each proposal or bid a check certified by a responsible bank, payable to the order of the president of the city council of the city of Oakland, for ten per cent of the amount of the bid.

Oakland, Cal., ————, 1911.

JOHN DOE,

City Clerk of the City of Oakland and Clerk of said City Council.

CHAPTER IV.

FORMS UNDER THE CHANGE OF GRADE ACT OF 1909.

§ 1045. In general.
§ 1046. Resolution of intention.
§ 1047. Notice of change of grade.
§ 1048. Majority protest.
§ 1049. Ordinance changing grade.

§ 1045. In General.—The following forms, with the exception of the form of protest, have been used in the city of Oakland. It will be noticed that in a general way they follow the form of the proceedings under the Vrooman Act.

§ 1046. Resolution of Intention.[1]

Resolved, that it is the intention of the council of the city of Oakland to order the following street work to be done, to wit:

To change and re-establish the official curb grades on Franklin street from 265 feet southerly of Twentieth street to 570 feet northerly of Twentieth street and on Twentieth street from Webster street to Broadway to the following elevation above Oakland City base, to wit: [Description same as in notice of change of grade.]

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California entitled, "An act to provide for changing or modifying the grade of public streets, lanes, alleys, courts or other places within municipalities," approved April 21, 1909.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper

[1] See ante, sec. 571.

and to post the same for two days consecutively on or near the chamber door of this council.

§ 1047. Notice of Change of Grade.[2]

NOTICE OF CHANGE OF GRADE.

Notice is hereby given, that on the twenty-first day of November, A. D. 1910, the city council of the city of Oakland passed Resolution of Intention No. 37,401, to order the following street work to be done, to wit:

To change and re-establish the official curb grades on Franklin street from 265 feet southerly of Twentieth street to 570 feet northerly of Twentieth street and on Twentieth street from Webster street to Broadway, to the following elevations above Oakland City base, to wit:

ON FRANKLIN STREET.

15.50 feet both curbs (being present grade) at points distant 265 feet southerly from the southern line of Twentieth street;

13 feet both curbs (being lowered 0.90 feet) at points distant 180 feet southerly from said southern line of Twentieth street;

10.93 feet both curbs (being lowered 1.07 feet) at points distant 80 feet southerly from said southern line of Twentieth street;

9.85 feet southern return, southwestern corner (being lowered 0.75 feet) of Twentieth and Franklin streets;

9.65 feet southern return, southeastern corner (being lowered 0.85 feet) of Twentieth and Franklin streets;

9.55 feet northern return, northeastern corner (being lowered 0.95 feet) of Twentieth and Franklin streets;

9.55 feet (being lowered 0.95 feet) western curb at the northern line of said Twentieth street;

16.50 feet (being present grade) at points distant 570 feet northerly from the northern line of said Twentieth street;

[2] See ante, sec. 573.

ON TWENTIETH STREET.

8.00 feet (being present grade) at the western line of Webster street;

9.60 feet eastern return, northeastern corner (being lowered 0.90 feet) and 9.65 (being lowered 0.85 feet) both in the crossing of Twentieth and Franklin streets;

9.50 feet western return, northwestern corner (being lowered 1 foot) and 9.70 feet western return, southwestern corner (being lowered 0.80 feet) both in the crossing of Twentieth and Franklin streets;

14 feet (being present grade) at the eastern line of Broadway.

Grade shall be straight between consecutive elevations on the respective curb lines.

Curbs of granite, cement, or concrete shall be two (2) inches higher than the above elevations, which are for wooden curbs.

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California entitled "An act to provide for changing or modifying the grade of public streets, lanes, alleys, courts or other places within municipalities." (Approved April 21, 1909.)

For further particulars, reference is hereby made to said Resolution of Intention No. 37,401, on file in the office of the city clerk of the city of Oakland. This notice shall be published for six days in the Oakland "Enquirer," being the newspaper designated by said city council for such publication.

Oakland, California, December 5, 1910.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

§ 1048. Majority Protest.[3]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore passed a resolution of intention, No. 37,401, to change and

[3] See ante, secs. 575–580.

re-establish the official curb grades on Franklin street from 265 feet southerly of Twentieth street to 570 feet northerly of Twentieth street, and on Twentieth street from Webster street to Broadway;

Now, therefore, we, the undersigned, do hereby certify that we are the owners of a majority of the frontage of the property fronting on said proposed work and improvement, each owning the property described opposite his or her name in the column headed "Description of Property," all of which property is situated in the city of Oakland, and has the amount of frontage upon said work and improvement set opposite each owner's name in the column marked "Number of Feet of Frontage"; and we do hereby protest against and object to said proposed work and improvement.

Dated at Oakland, California, this seventh day of December, 1910.

Names	Description of Property	Number of Feet of Frontage
John Smith	Lot 7 in Block 150 as delineated on Kellersberger's Map of Oakland on file in the office of the County Recorder of Alameda County, California.	25
John Jones, by Richard Roe, Agent	Lot 8 in Block 150 as delineated on the Map above referred to.	25
Mary Ryan	Lot 9 in Block 150 as delineated on the Map above referred to.	25

State of California,
County of Alameda,—ss.

John Smith, being duly sworn, says that he is one of the signers of the foregoing protest; that each signature thereto is the genuine signature of the person whose name purports to be thereto subscribed.

JOHN SMITH.

Subscribed and sworn to before me this seventh day of December, 1910.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

State of California,
County of Alameda,—ss.

Richard Roe, being duly sworn, says that he subscribed the name of John Jones to the foregoing protest and his own name as agent; that at the time of signing said protest he was and now is the agent of said John Jones for the purpose of signing the same, and at said time was and now is duly authorized by said John Jones to sign said protest for said John Jones and in his name.

RICHARD ROE.

Subscribed and sworn to before me this seventh day of December, 1910.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

§ 1049. Ordinance Changing Grade.[4]

An ordinance changing and re-establishing the official curb grades on Franklin street from 265 feet southerly of Twentieth street to 570 feet northerly of Twentieth street and on Twentieth street from Webster street to Broadway.

Be it ordained by the council of the city of Oakland, as follows:

Section 1.—Whereas, the council of the city of Oakland did on November 21, 1910, by Resolution of Intention No. 37,401, declare its intention to change and re-establish the official curb grades on Franklin street from 265 feet southerly of Twentieth street to 570 feet northerly of Twentieth street, and on Twentieth street from Webster street to Broadway, and

Whereas, the aforesaid resolution directed the clerk of the council to publish and post for two days said resolution of intention, and

[4] See ante, sec. 581.

Whereas, said resolution of intention was published and posted for two days describing the proposed changes of grade, and

Whereas, no protests were filed against said proposed change of grade, now, therefore, it is hereby ordered that the grades on Franklin street from 265 feet southerly on Twentieth street to 570 feet northerly of Twentieth street and on Twentieth street from Webster street to Broadway are hereby changed to and established at the following elevations above Oakland City base, to wit:

ON FRANKLIN STREET.

15.50 feet both curbs at points distant 265 feet southerly from the southern line of Twentieth street;

13 feet both curbs at points distant 180 feet southerly from said southern line of Twentieth street;

10.93 feet both curbs at points distant 80 feet southerly from said southern line of Twentieth street;

9.85 feet southern return, southwestern corner of Twentieth and Franklin streets;

9.65 feet southern return, southeastern corner of Twentieth and Franklin streets;

9.55 feet northern return, northeastern corner of Twentieth and Franklin streets;

9.55 feet western curb at the northern line of said Twentieth street;

16.50 feet at points distant 570 feet northerly from the northern line of said Twentieth street;

Curbs shall have straight grades between consecutive elevations.

ON TWENTIETH STREET.

8.00 feet at the western line of Webster street;

9.60 feet eastern return, northeastern corner and 9.65 feet both in the crossing of Twentieth and Franklin streets;

9.50 feet western return, northwestern corner and 9.70 feet western return, southwestern corner both in the crossing of Twentieth and Franklin streets;

14 feet at the eastern line of Broadway.

Curbs shall have straight grades between consecutive elevations.

Section 2.—Curbs of granite, cement, or concrete shall be two (2) inches higher than the above elevations, which are for wooden curbs.

Section 3.—Any part of an ordinance in conflict herewith is hereby repealed.

Section 4.—This ordinance shall take effect upon its passage and approval.

In council, Oakland, Cal., February 6, 1911.

Passed to print by the following vote:

Ayes: Messrs. Baccus, Bronner, Cobbledick, Elliot, Ellsworth, Everhart, MacGregor, Stachler, Stiefvater, Vose, and President Pendleton—11.

Noes: None.

Absent: None.

Attest: FRANK R. THOMPSON,
City Clerk.

Oakland, Cal., February 14, 1911.

CHAPTER V.

FORMS UNDER THE STREET IMPROVEMENT ACT OF 1909.

§ 1050. In general.
§ 1051. Resolution of intention.
§ 1052. Street superintendent's notice.
§ 1053. Majority protest.
§ 1054. Resolution ordering the work.
§ 1055. Resolution of board of public works fixing time.
§ 1056. Notice of hearing petitions for damages.
§ 1057. Petition for damages.
§ 1058. Resolution of award of contract.
§ 1059. Contract.
§ 1060. Application for acceptance of work.
§ 1061. Notice of time of hearing application for acceptance of work.
§ 1062. Resolution accepting work.
§ 1063. Report.
§ 1064. Resolution fixing time for hearing report.
§ 1065. Notice of hearing of report.
§ 1066. Resolution confirming report.

§ 1050. In General.—In the following sections, I have given the principal forms for the proceedings under the Street Improvement Act of 1909 up to the collection of the assessment. The forms for use in the collection and enforcement of the assessment are quite similar to those used under the Street Opening Act of 1889, which are given in a later chapter.

§ 1051. Resolution of Intention.[1]

Whereas, the city council has heretofore by ordinance changed the grade of Fifth street between the eastern line of Webster street and the western line of Alice street, in the city of Oakland; and

Whereas, in the opinion of the city council the public interest and convenience require the improvement hereinafter described; now, therefore be it

[1] See ante, sec. 587.

Resolved, that it is the intention of the city council of the city of Oakland to order that Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, be graded to the official grade and paved with asphalt;

That in the opinion of the city council damage to private property would result from such improvement;

That Monday, the thirteenth day of February, 1911, at the hour of 8:15 o'clock P. M., at the council chamber of this council, in the City Hall of the city of Oakland, be and the same are hereby fixed as the time and place for the hearing of protests in relation to said improvement by this city council;

That the following is a description of the district of land, and of the exterior boundaries thereof, hereby declared to be benefited by said improvement and to be assessed to pay the costs and expenses thereof, and the damages caused by said improvement and to be known as the assessment district. All that certain land situated in the city of Oakland, county of Alameda, state of California, particularly described as follows: Commencing at a point formed by the intersection of the southern line of Sixth street with the eastern line of Webster street, and running thence easterly along the southern line of Sixth street to the western line of Harrison street; thence southerly along the western line of Harrison street to the northern line of Fourth street; thence westerly along the northern line of Fourth street to the eastern line of Webster street; thence northerly along the eastern line of Webster street to the southern line of Sixth street; saving, excepting and excluding from said district, all public streets, avenues, lanes, alleys, courts, and places therein included and contained.

That all of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California, entitled, "An act to provide for the improvement of public streets, lanes, alleys, courts and places within municipalities, in cases where any damage to private prop-

erty would result from such improvement, and for the assessment of the costs, damages, and expenses thereof upon the property benefited thereby," approved April 21, 1909; also in accordance with the plans and specifications made therefor by the city engineer of the city of Oakland and adopted by Resolution No. 21,000 of this city council.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper and to post the same for two days conspicuously on or near the chamber door of this council.

§ 1052. Street Superintendent's Notice.[2]

NOTICE OF STREET WORK.

Notice is hereby given that on the sixteenth day of January, 1911, the city council of the city of Oakland, passed Resolution of Intention No. 25,001 to order the following street work to be done, to wit:

That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt.

That in the opinion of the city council damage to private property would result from such improvement.

That Monday, the thirteenth day of February, 1911, at the hour of 8:15 o'clock P. M., at the council chamber of the city council in the City Hall of the city of Oakland, have been fixed as the time and place for the hearing of protests in relation to said improvement by the city council; and all persons interested are hereby notified to appear at said time and place with their objections to said improvement, if any they have;

All of said proposed work and improvement shall be done in pursuance of an act of the legislature of the state of

2 See ante, sec. 589.

California entitled, "An act to provide for the improvement of public streets, lanes, alleys, courts and places within municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," approved April 21, 1909; also in accordance with the plans and specifications made therefor by the city engineer of the city of Oakland, and adopted by Resolution No. 21,000 of the city council of the city of Oakland.

For further particulars reference is hereby made to said Resolution of Intention No. 25,001 on file in the office of the city clerk of the city of Oakland.

Oakland, Cal., January 20, 1911.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

§ 1053. Majority Protest.[8]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore passed Resolution of Intention No. 25,001 to order the following street work to be done, to wit: That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt;

Now, therefore, we, the undersigned, do hereby certify that we are the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district fixed by your Honorable Body for said work, each owning the property described opposite his or her name in the column below headed "Description of Property," all of which property is situated within the city of Oakland and has the amount of frontage upon said work and improvement set opposite each owner's name in the column marked "Number of Feet of Frontage"; and the nature of the interest of each of the undersigned is set forth opposite

[8] See ante, secs. 591–594.

the name of each owner in the column marked "Particulars of Interest"; and we do hereby protest against and object to said work and improvement upon the ground that said work is not needed.

Dated at Oakland, Cal., this eleventh day of February, 1911.

State of California,
County of Alameda,—ss.

John Smith, being duly sworn, says that he is one of the signers of the foregoing protest; that each signature thereto is the genuine signature of the person whose name purports to be subscribed thereto.

JOHN SMITH.

Subscribed and sworn to before me this eleventh day of February, 1911.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

State of California,
County of Alameda,—ss.

Richard Roe, being duly sworn, says that he subscribed the name of John Jones to the foregoing protest and his own as agent; that at the time of signing said protest he was and now is the agent of said John Jones for the purpose of signing the same, and at said time was and now is duly authorized by said John Jones to sign said protest for said John Jones and in his name.

RICHARD ROE.

Subscribed and sworn to before me this eleventh day of February, 1911.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

§ 1054. Resolution Ordering the Work.[4]

Whereas, the city council has heretofore by ordinance changed the grade of Fifth street between the eastern line of Webster street and the western line of Alice street in the city of Oakland; and whereas, in the opinion of the city council the public interest and convenience require the improvement hereinafter described; now, therefore, be it

Resolved, that the city council of the city of Oakland hereby orders the following street work to be done and improvement to be made, to wit:

That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt;

That in the opinion of the city council damage to private property would result from said improvement;

That the following is a description of the district of land, and of the exterior boundaries thereof, hereby declared to be benefited by said improvement and to be assessed to pay the costs and expenses thereof, and the damages caused by said improvement, and to be known as the assessment district: All that certain land situated in the city of Oakland, county of Alameda, state of California, particularly described as follows:

Commencing at a point formed by the intersection of the southern line of Sixth street with the eastern line of Webster street, and running thence easterly along the southern line of Sixth street to the western line of Harrison street; thence southerly along the western line of Harrison street to the northern line of Fourth street; thence westerly along the northern line of Fourth street to the eastern line of Webster street; thence northerly along the eastern line of Webster street to the southern line of Sixth street; saving, excepting and excluding from said district all public streets, avenues, lanes, alleys, courts and places therein included and contained;

[4] See ante, sec. 595.

erty would result from such improvement, and for the assessment of the costs, damages, and expenses thereof upon the property benefited thereby," approved April 21, 1909; also in accordance with the plans and specifications made therefor by the city engineer of the city of Oakland and adopted by Resolution No. 21,000 of this city council.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention and the street superintendent's notice of the passage thereof shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper and to post the same for two days conspicuously on or near the chamber door of this council.

§ 1052. Street Superintendent's Notice.[2]

NOTICE OF STREET WORK.

Notice is hereby given that on the sixteenth day of January, 1911, the city council of the city of Oakland, passed Resolution of Intention No. 25,001 to order the following street work to be done, to wit:

That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt.

That in the opinion of the city council damage to private property would result from such improvement.

That Monday, the thirteenth day of February, 1911, at the hour of 8:15 o'clock P. M., at the council chamber of the city council in the City Hall of the city of Oakland, have been fixed as the time and place for the hearing of protests in relation to said improvement by the city council; and all persons interested are hereby notified to appear at said time and place with their objections to said improvement, if any they have;

All of said proposed work and improvement shall be done in pursuance of an act of the legislature of the state of

2 See ante, sec. 589.

California entitled, "An act to provide for the improvement of public streets, lanes, alleys, courts and places within municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," approved April 21, 1909; also in accordance with the plans and specifications made therefor by the city engineer of the city of Oakland, and adopted by Resolution No. 21,000 of the city council of the city of Oakland.

For further particulars reference is hereby made to said Resolution of Intention No. 25,001 on file in the office of the city clerk of the city of Oakland.

Oakland, Cal., January 20, 1911.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

§ 1053. Majority Protest.[8]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: Your Honorable Body having heretofore passed Resolution of Intention No. 25,001 to order the following street work to be done, to wit: That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt;

Now, therefore, we, the undersigned, do hereby certify that we are the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district fixed by your Honorable Body for said work, each owning the property described opposite his or her name in the column below headed "Description of Property," all of which property is situated within the city of Oakland and has the amount of frontage upon said work and improvement set opposite each owner's name in the column marked "Number of Feet of Frontage"; and the nature of the interest of each of the undersigned is set forth opposite

[8] See ante, secs. 591–594.

the name of each owner in the column marked "Particulars of Interest"; and we do hereby protest against and object to said work and improvement upon the ground that said work is not needed.

Dated at Oakland, Cal., this eleventh day of February, 1911.

State of California,
County of Alameda,—ss.

John Smith, being duly sworn, says that he is one of the signers of the foregoing protest; that each signature thereto is the genuine signature of the person whose name purports to be subscribed thereto.

JOHN SMITH.

Subscribed and sworn to before me this eleventh day of February, 1911.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

State of California,
County of Alameda,—ss.

Richard Roe, being duly sworn, says that he subscribed the name of John Jones to the foregoing protest and his own as agent; that at the time of signing said protest he was and now is the agent of said John Jones for the purpose of signing the same, and at said time was and now is duly authorized by said John Jones to sign said protest for said John Jones and in his name.

RICHARD ROE.

Subscribed and sworn to before me this eleventh day of February, 1911.

[Notarial Seal] GEORGE HARRIS,
Notary Public in and for the County of Alameda, State of California.

§ 1054. Resolution Ordering the Work.[4]

Whereas, the city council has heretofore by ordinance changed the grade of Fifth street between the eastern line of Webster street and the western line of Alice street in the city of Oakland; and whereas, in the opinion of the city council the public interest and convenience require the improvement hereinafter described; now, therefore, be it

Resolved, that the city council of the city of Oakland hereby orders the following street work to be done and improvement to be made, to wit:

That Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt;

That in the opinion of the city council damage to private property would result from said improvement;

That the following is a description of the district of land, and of the exterior boundaries thereof, hereby declared to be benefited by said improvement and to be assessed to pay the costs and expenses thereof, and the damages caused by said improvement, and to be known as the assessment district: All that certain land situated in the city of Oakland, county of Alameda, state of California, particularly described as follows:

Commencing at a point formed by the intersection of the southern line of Sixth street with the eastern line of Webster street, and running thence easterly along the southern line of Sixth street to the western line of Harrison street; thence southerly along the western line of Harrison street to the northern line of Fourth street; thence westerly along the northern line of Fourth street to the eastern line of Webster street; thence northerly along the eastern line of Webster street to the southern line of Sixth street; saving, excepting and excluding from said district all public streets, avenues, lanes, alleys, courts and places therein included and contained;

[4] See ante, sec. 595.

That all of the herein described work shall be done in pursuance of an act of the legislature of the state of California entitled, "An act to provide for the improvement of public streets, lanes, alleys, courts and places in municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," approved April 21, 1909; also in accordance with the plans and specifications made therefor by the city engineer of the city of Oakland and adopted by Resolution No. 21,000 of this city council;

That the improvement herein described is hereby referred to the board of public works of the city of Oakland to estimate the damages caused thereby and report an assessment of said damages and of all costs and expenses of the improvement on the property benefited thereby included within the assessment district herein described;

That the clerk of this council is hereby directed to publish this resolution by two insertions in the Oakland "Enquirer," a daily newspaper published and circulated in the city of Oakland, hereby designated for that purpose. He is also directed to post this resolution on or near the chamber door of this council and at two other public places in said city for two days. He is also directed to post conspicuously for five days on or near the chamber door of this council a notice, with plans and specifications, inviting sealed proposals or bids for doing the work ordered, and to publish, for two days, a notice inviting sealed proposals or bids for said work and referring to the specifications and plans posted or on file, in the Oakland "Enquirer," a daily newspaper published and circulated in the city of Oakland, hereby designated for the purpose. Both of said notices shall require a certified check or bond as prescribed by law for an amount not less than ten per cent of the aggregate of the proposal.

§ 1055. Resolution of Board of Public Works Fixing Time.

Whereas, the city council has heretofore ordered that Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street be graded to the official grade and paved with asphalt; and whereas, in the opinion of the city council damage to private property would result from such improvement; now, therefore, be it

Resolved, that Wednesday the twenty-second day of March, 1911, at the hour of 2 o'clock P. M., at room No. 5 in the City Hall of the city of Oakland, be and the same are hereby fixed as the time and place for the hearing of petitions for damages caused or which will be caused by said improvement;

That the secretary of this board be and he is hereby directed to publish notice of the time and place of hearing for five days in the Oakland "Enquirer," a daily newspaper printed, published and circulated in the said city of Oakland, hereby designated for that purpose, the first publication of said notice to be made at least thirty days prior to the date herein fixed for hearing.

§ 1056. Notice of Hearing Petitions for Damages.[5]

NOTICE OF HEARING PETITIONS FOR DAMAGES.

Notice is hereby given by the board of public works of the city of Oakland that Wednesday, the twenty-second day of March, 1911, at the hour of 2 o'clock P. M., at room No. 5 in the City Hall of the city of Oakland, have been fixed by it as the time and place for the hearing of petitions for damages caused or which will be caused by the street work and improvement ordered by the city council of the city of Oakland on the thirteenth day of February, 1911, by Resolution No. 25,021, wherein it is ordered that Fifth street in the city of Oakland, from the eastern line of Webster street to the

[5] See ante, sec. 597.

western line of Alice street, be graded to the official grade and paved with asphalt.

Dated this fifteenth day of February, 1911.

By order of the board of public works.

J. W. SMITH,
Secretary.

§ 1057. Petition for Damages.[6]

To the Honorable, the City Council and the Board of Public Works of the City of Oakland.

Gentlemen: The petition of George Brown respectfully shows:

That your petitioner is the owner of all that certain lot, piece, or parcel of land situate in the city of Oakland, county of Alameda, state of California, particularly described as follows: Commencing at a point formed by the intersection of the northern line of Fifth street with the eastern line of Harrison street, and running thence easterly along said line of Fifth street one hundred (100) feet; thence at a right angle northerly one hundred (100) feet; thence at a right angle westerly one hundred (100) feet to the eastern line of Harrison street; and thence southerly along said line of Harrison street one hundred feet to the point of beginning.

That the market value of said property is ten thousand dollars.

That said property will be damaged by the grading and paving of Fifth street from the eastern line of Webster street to the western line of Alice street, as ordered by the city council of the city of Oakland by Resolution No. 25,021, to the amount of three thousand dollars, by reason of the fact that access to said property from Fifth street will be impaired thereby.

That the postoffice address of your petitioner is 364 Fifth street, Oakland, Cal.

[6] See ante, sec. 598.

Wherefore, your petitioner prays that he be awarded damages in the sum of three thousand dollars.

GEORGE BROWN.

State of California,
County of Alameda,—ss.

George Brown, being duly sworn, says that he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE BROWN.

Subscribed and sworn to before me this twenty-first day of March, 1911.

WILLIAM GRAY,
Notary Public in and for the County of Alameda, State of California.

§ 1058. Resolution of Award of Contract.[7]

Resolved, that the council of the city of Oakland, having in public session on the —— day of ————, 1911, opened, examined, and publicly declared all sealed proposals or bids offered for the following work, to wit: for the grading and paving of Fifth street in the city of Oakland from the eastern line of Webster street to the western line of Alice street, hereby rejects all of said bids except that next herein mentioned, and hereby awards the contract for said work to the lowest responsible bidder, to wit, to Broadway Paving Company, a corporation, at the price specified in its proposal on file for said work, to wit: [Stating prices as in bid.]

That the contract for such work shall provide that the work must be commenced within twenty days after the contractor receives written notice from the superintendent of

[7] See ante, sec. 603.

streets that there is sufficient money in the special fund devoted to the proposed improvement to pay the contract price, and completed within eighty days from the date he receives said written notice.

§ 1059. Contract.[8]

This agreement, made and entered into this —— day of ————, 19—, by and between the Broadway Paving Company, a corporation organized and existing under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Oakland, the party of the first part, and the city of Oakland, a municipal corporation organized and existing under and by virtue of the laws of the state of California, the party of the second part, witnesseth:

That whereas, the party of the first part has, by virtue of proceedings duly had under and by virtue of an act of the legislature of the state of California known as the "Street Improvement Act of 1909," been awarded a contract for the work hereinafter mentioned;

Now, therefore, the party of the first part, for the consideration hereinafter mentioned, promises and agrees with the party of the second part, that it will do and perform, or cause to be done and performed, in a good and workmanlike manner, under the supervision of the city engineer of the city of Oakland, and furnish the materials required for the execution and completion thereof, all the following work, to wit: [Description of work as in resolution of intention.]

According to the plans and specifications for said work adopted by said city council on the —— day of ————, 19—, and on file with the city clerk of said city.

Said work shall be commenced within twenty days after the party of the first part receives written notice from the superintendent of streets of the city of Oakland that there is sufficient money in the special fund devoted to the improvement to pay the contract price, and completed within

[8] See ante, sec. 600 ff.

——— days after he receives said notice. Time is and shall be of the essence of this agreement.

And the party of the second part agrees that it will, upon the completion of the work as herein provided for and upon acceptance thereof by the city council of the city of Oakland after application made and proceedings duly had as required by said "Street Improvement Act of 1909," pay to the party of the first part [state consideration].

Provided, that no work shall be paid for until it has been accepted by said city council.

And it is agreed and expressly understood by the parties to this agreement, that under it eight hours of labor shall constitute a day's work, and that the said party of the first part shall not require more than eight hours' labor in a day from any person employed by it herein.

And that in accordance with an act of the legislature of the state of California entitled, "An act fixing the minimum rate of compensation for labor on public work," approved March 9, 1897, two dollars shall be the minimum compensation paid for each day's labor upon the work embraced in this contract.

In witness whereof, etc.

§ 1060. Application for Acceptance of Work.[9]

To the Honorable, the City Council of the City of Oakland.

Gentlemen: The Broadway Paving Company, a corporation, respectfully represents that it has completed all the grading and paving of Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, in accordance with its contract with the city of Oakland, dated ———.

Wherefore, said Broadway Paving Company, a corporation, prays that a day be fixed for the hearing of this application, that notice thereof be given in accordance with

[9] See ante, sec. 605.

law, and that upon the hearing said work may be accepted by your Honorable Body.

Dated ————.

(Signed) ————————.

§ 1061. Notice of Time of Hearing Application for Acceptance of Work.

NOTICE OF HEARING APPLICATION FOR ACCEPTANCE OF WORK.

Notice is hereby given that the Broadway Paving Company, a corporation, has filed a written application with the city council of the city of Oakland for the acceptance of the work of grading and paving Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, which work was ordered by the city council of the city of Oakland by Resolution No. ———, and that on ———, the —— day of ————, 19—, at the hour of —— o'clock P. M., at the council chamber in the City Hall of the city of Oakland, the said city council will hear and consider any objections to the acceptance of said work or of any part thereof.

Dated ————.

————————,

Clerk of the City Council of the City of Oakland.

§ 1062. Resolution Accepting Work.

Whereas, the application of the Broadway Paving Company, a corporation, for the acceptance of the work of the grading and paving of Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, has come on this day regularly to be heard; and

Whereas, it appears to the satisfaction of the council that due notice of the time and place of hearing said application has been given by publication in the manner and for the time required by law; and

Whereas, no objections to the acceptance of said work have been filed; and

Whereas, it appears to the satisfaction of the council that said work has been completed in all respects as required by the contract heretofore entered into between said Broadway Paving Company, a corporation, and the city of Oakland on the —— day of ————, 19—; now, therefore, be it

Resolved, that said work be and the same is hereby accepted.

§ 1063. Report.

To the Honorable, the City Council of the City of Oakland.

Gentlemen: The board of public works of the city of Oakland files its report, pursuant to Resolution No. ——— of your Honorable Body, ordering that Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, be graded to the official grade and paved with asphalt; that said work be done under the provisions of an act of the legislature of the state of California known as the "Street Improvement Act of 1909"; and that said work be referred to the board of public works of said city to estimate the damages caused thereby, and to report an assessment of said damages and of all costs and expenses of the improvement on the property benefited thereby included within the assessment district therein described; and shows:

That upon the passage of the resolution above referred to, this board appointed a time and place for the hearing of petitions for damages caused by said improvement, to wit, it fixed ———, the —— day of ————, at the hour of ——, at ———, in the City Hall of the city of Oakland, as such time and place.

That thereupon it caused notice of such time and place to be published for five days in the Oakland "Enquirer," a daily newspaper printed, published and circulated in said city, the first publication being more than thirty days prior to the day set for hearing.

That prior to the day set for hearing petitions for damages, this board, and all the members thereof, viewed the location of the proposed improvement and the property affected thereby.

That at or before the time set for hearing, petitions for damages were filed by ————, and no other petitions for damages have been filed.

That at the time and place fixed for hearing, as aforesaid, this board considered the said petitions for damages, and after hearing all petitioners who appeared, and after viewing the location of the proposed improvement and the property affected thereby, this board proceeded to determine the amount of damages, if any, which will be sustained by each such petitioner because of the proposed improvement.

That this board has annexed hereto a schedule describing the lots or parcels of land belonging to each petitioner for damages and which will be damaged by said proposed improvement, stating the amount of damages to each lot or parcel as determined by this board, and the name of the owner of each such lot or parcel of land so damaged; that said schedule is marked Exhibit "A," and is hereby referred to and made a part of this report; that in said Exhibit "A," in the first column under the title "Property Damaged," is set forth a description of each lot or parcel of land belonging to each petitioner for damages and which will be damaged by said proposed improvement; that in the second column under the title "Names of Owners" is set forth opposite each description the name of the owner of such lot or parcel of land so damaged; that in the third column under the title "Damages Awarded" is set forth opposite each description and the name of the owner, the amount of damage to such lot or parcel of land so damaged.

That this board, as soon as practicable, after determining what damages will be caused by said improvement, and after the signing of the contract for the work, assessed the total amount of the damages so determined, the total amount of the contract price for the doing of such work, and the

total amount of all incidental expenses of such improvement, including the necessary expenses and disbursements of this board, the cost of making the assessment, and all expenses necessarily incurred by the city in connection with the proposed improvement for maps, diagrams, plans, surveys and other matters incident thereto, upon the respective lots or parcels of land in the assessment district described in the resolution of intention of the city council for said improvement, in proportion to the benefits to be received by such lots or parcels of land, respectively, from the said improvement.

That this board has annexed hereto a diagram showing the assessment district, and also the boundaries and dimensions of the respective lots or parcels of land within said assessment district; that said diagram is marked Exhibit "B," and is hereby referred to and made a part of this report; that each of such lots or parcels of land is given a separate number in red ink upon said diagram.

That this board has annexed hereto a proposed assessment which is marked Exhibit "C," and is hereby referred to and made a part of this report; that said proposed assessment shows the total amount of damages that will be caused by said improvement, as determined by this board, the total amount of the contract price for the work, and the total amount of the incidental expenses; that in said Exhibit "C," under the head of "Apportionment of Assessment," this board has assessed the total cost of the improvement upon the respective lots or parcels of land in the assessment district in proportion to the benefits to be received by such lots or parcels of land, respectively, from said improvement; that in the first column thereunder, under the title "Lot Number," are set forth references to the lots or parcels of land as shown upon the diagram contained in Exhibit "B" hereunto annexed, by the red ink numbers thereof as numbered on said diagram; that in the second column thereunder, under the title "Names of Owners," is set forth opposite the number of each lot the name of the owner, if

known, otherwise the word "Unknown"; that in the third column thereunder, under the title "Amount of Assessment," are set forth opposite each lot number and the name of its owner, the amount of the assessment thereon as determined by this board.

Wherever the abbreviations hereinafter set forth are used in this report or in any of the exhibits hereunto annexed, they are defined to mean as follows:

No. means Number; Amt. means Amount; Dolls. means Dollars; Cts. means Cents; N. means North, Northern or Northerly; S. means South, Southern or Southerly; W. means West, Western or Westerly; E. means East, Eastern or Easterly; N. W. means Northwest, Northwestern or Northwesterly; N. E. means Northeast, Northeastern or Northeasterly; S. E. means Southeast, Southeastern or Southeasterly; S. W. means Southwest, Southwestern or Southwesterly; Ft. means Feet; In. means Inches; Com. means Commencing or Commencement; Beg. means Beginning; Tr. means Tract; Blk. means Block. Wherever the character "$" is used it means Dollars.

Oakland, California, ————.

Respectfully submitted,

————————.

EXHIBIT "A."

Schedule Showing Damages Awarded.

Property Damaged.	Names of Owners.	Damages Awarded.

EXHIBIT "C."

Assessment.

Total amount of damages that will be caused by said improvement .....$
Total amount of contract price for the work.....$

Incidental Expenses.

Necessary expenses and disbursements of the board of public works.....$
Cost of making assessment. .....$
Expenses necessarily incurred by the city in connection with the proposed improvement for maps, diagrams, plans, surveys and other matters incidental thereto....$

Total amount of all incidental expenses.....$

Total cost of the improvement.....$

Apportionment of Assessment.

Lot number.	Names of Owners.	Amount of Assessment.

§ 1064. Resolution Fixing Time for Hearing Report.

Whereas, the board of public works has filed with the clerk of this council a report in writing containing an estimate of the damages caused by the grading and paving of Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, and an assessment of said damages, and of all costs and expenses

of the improvement, on the property benefited thereby; now, therefore, be it

Resolved, that ———, the —— day of ————, 19—, at the hour of —— o'clock P. M., at the council chamber in the City Hall of the city of Oakland, be and the same are hereby fixed as the time and place for hearing said report; and the clerk of this council is hereby directed to publish notice of such hearing by three insertions in the Oakland "Enquirer," a daily newspaper published and circulated in the city of Oakland, and hereby designated for the purpose, said publication to be completed at least ten days before the day fixed for hearing.

§ 1065. Notice of Hearing of Report.

NOTICE OF HEARING REPORT OF BOARD OF PUBLIC WORKS AS TO BENEFITS AND DAMAGES CAUSED BY THE GRADING AND PAVING OF FIFTH STREET FROM THE EAST LINE OF WEBSTER STREET TO THE WEST LINE OF ALICE STREET.

Notice is hereby given that the board of public works of the city of Oakland has filed with the clerk of the city council of said city its report in writing containing an estimate of the damages caused by the grading and paving of Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, and an assessment of said damages, and of all costs and expenses of the improvement, on the property benefited thereby; and that ———, the —— day of ————, 19—, at the hour of —— o'clock P. M., at the council chamber in the City Hall of the city of Oakland, have been fixed as the time and place for hearing said report. Any objection to said report shall be in writing signed by the objector, or his agent, and shall comply in all respects with an act of the legislature of the state of California known as the "Street Improvement Act of 1909," and shall be filed with the clerk

of the city council of the city of Oakland at or before the time fixed for the hearing.

Oakland, Cal., ————.

By order of the council.

————————,

Clerk of the City Council.

§ 1066. Resolution Confirming Report.

Whereas the board of public works has filed with the clerk of this council a report in writing containing an estimate of the damages caused by the grading and paving of Fifth street in the city of Oakland, from the eastern line of Webster street to the western line of Alice street, and an assessment of said damages, and of all costs and expenses of the improvement, on the property benefited thereby, all in pursuance of Resolution No. ——— heretofore adopted by this council; and

Whereas, after due notice given for the time and in the manner required by law and the order of this council, said report has come on this day regularly for hearing; and

Whereas, the council has heard all objectors and considered all objections filed; now, therefore, be it

Resolved, that said report be and the same is hereby confirmed.

CHAPTER VI.

FORMS UNDER STREET OPENING ACT OF 1889.

§ 1067. Resolution of intention.
§ 1068. Notice of intention.
§ 1069. Ordinance ordering work.
§ 1070. Certificate of appointment of commissioners.
§ 1071. Bond of commissioners.
§ 1072. Resolution approving bonds of commissioners.
§ 1073. Report of commissioners.
§ 1074. Resolution directing notice of filing report.
§ 1075. Notice of filing report.
§ 1076. Resolution adopting report.
§ 1077. Superintendent's notice requiring payment of assessment.
§ 1078. Delinquent list and notice of sale.
§ 1079. Certificate of sale.

§ 1067. Resolution of Intention.[1]

Resolved, that it is the intention of the council of the city of Oakland to order the following street work to be done, to wit:

That Bryan (formerly Palm) street be produced northwesterly and opened to a uniform width of sixty (60) feet from the present northwestern termination of said street, as shown on that certain map entitled "Map of Fruitvale Electric Road Tract," filed in the office of the county recorder of Alameda county, state of California, January 7, 1891, in Book of Maps 8, page 55, northwesterly to the eastern line of Fruitvale avenue.

The lands necessary and convenient to be taken for said purpose are described as follows, to wit: Beginning at the point formed by the intersection of the southwestern line of Bryan (formerly Palm) street with the western line of "Fruitvale Electric Road Tract" as said lines are shown on the said "Map of Fruitvale Electric Road Tract"; thence northwesterly along said southwestern line of Bryan street produced northwesterly to the eastern line of Fruitvale

[1] See ante, secs. 675–677.

avenue; thence northerly along said eastern line of Fruitvale avenue to the intersection therewith of the northeastern line of said Bryan street produced northwesterly; thence southeasterly along said northeastern line of Bryan street produced northwesterly to the western line of said "Fruitvale Electric Road Tract"; thence southerly along said western line of "Fruitvale Electric Road Tract" to the point of beginning.

And said council does hereby determine and declare that said proposed work and improvement is of more than local or ordinary public benefit, and will affect and benefit the lands and district hereinafter described, and which said district is hereby declared to be the district affected and benefited by said work and improvement, and that therefore the entire damages, costs and expenses of said work and improvement shall be and are hereby made chargeable against and shall be assessable upon said lands and district, which district is within the city of Oakland, county of Alameda, state of California; and the exterior boundaries of the lands affected and benefited by said work and improvement are particularly described as follows, to wit:

Bounded on the west by the eastern line of Fruitvale avenue; on the northeast by a line parallel to and distant (measured at right angles) one hundred (100) feet northeasterly from the northeastern line of said Bryan street, and also by the northwestern and southeastern production of said parallel line; on the southeast by a line parallel to and distant (measured at right angles) one hundred (100) feet southeasterly from the southeastern line of Peralta avenue; and on the southwest by a line parallel to and distant (measured at right angles) two hundred and sixty (260) feet southwesterly from the hereinbefore described northeastern boundary line; saving, excepting and excluding from said district all public streets, avenues and roads therein included and contained.

All of the herein proposed work shall be done in pursuance of an act of the legislature of the state of California

entitled, "An act to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose," approved March 6, 1889, and the several acts amendatory thereof or supplemental thereto.

The Oakland "Enquirer" is hereby designated as the daily newspaper published and circulated in said city in which the superintendent's notice of the passage of this resolution shall be published.

§ 1063. Notice of Intention.[2]

NOTICE OF PUBLIC WORK.

Notice is hereby given, that on the nineteenth day of December, A. D. 1910, the city council of the city of Oakland passed Resolution of Intention No. 37,524, to order the following street work to be done, to wit:

That Bryan (formerly Palm) street, be produced northwesterly and opened to an uniform width of sixty (60) feet, from the present northwestern termination of said street, as shown on that certain map entitled "Map of Fruitvale Electric Road Tract," filed in the office of the county recorder of Alameda county, state of California, January 7, 1891, in Book of Maps 8, page 55, northwesterly to the eastern line of Fruitvale avenue.

The lands necessary and convenient to be taken for said purpose are described as follows, to wit: Beginning at the point formed by the intersection of the southwestern line of Bryan (formerly Palm) street with the western line of "Fruitvale Electric Road Tract" as said lines are shown on the said "Map of Fruitvale Electric Road Tract"; thence northwesterly along said southwestern line of Bryan street produced northwesterly to the eastern line of Fruitvale avenue; thence northerly along said eastern line of Fruit-

[2] See ante, sec. 678.

vale avenue to the intersection therewith of the northeastern line of said Bryan street produced northwesterly; thence southeasterly along said northeastern line of Bryan street produced northwesterly, to the western line of said "Fruitvale Electric Road Tract"; thence southerly along said western line of "Fruitvale Electric Road Tract" to the point of beginning.

And said council does hereby determine and declare that said proposed work and improvement is of more than local or ordinary public benefit, and will affect and benefit the lands and district hereinafter described, and which said district is hereby declared to be the district affected and benefited by said work and improvement, and that therefore the entire damages, costs and expenses of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said lands and district, which district is within the city of Oakland, county of Alameda, state of California; and the exterior boundaries of the lands affected and benefited by said work and improvement are particularly described as follows, to wit:

Bounded on the west by the eastern line of Fruitvale avenue; on the northeast by a line parallel to, and distant (measured at right angles) one hundred (100) feet northeasterly from the northeastern line of said Bryan street, and also by the northwestern and southeastern production of said parallel line; on the southeast by a line parallel to and distant (measured at right angles) one hundred (100) feet southeasterly from the southeastern line of Peralta avenue; and on the southwest by a line parallel to and distant (measured at right angles) two hundred sixty (260) feet southwesterly from the hereinbefore described northeastern boundary line; saving, excepting and excluding from said district all public streets, avenues and roads therein included and contained.

For further particulars, reference is hereby made to Resolution of Intention No. 37,524 for the above-described work on file in the office of the city clerk of the city of Oakland.

This notice shall be published for ten days in the Oakland "Enquirer," being the newspaper designated by said city council for such publication.

Oakland, California, December 30, 1910.

CHARLES S. WARNER,
Superintendent of Streets of the City of Oakland.

§ 1069. Ordinance Ordering Work.[3]

ORDINANCE NO. 2646.

An ordinance ordering the opening and widening of Cypress street between the northerly line of Eighth street and the southerly line of Ninth street in the city of Oakland to the uniform width of sixty (60) feet, and appointing three commissioners to assess benefits and damages and to have general supervision of the proposed work.

Be it ordained by the council of the city of Oakland, as follows:

Section 1.—Whereas, the council of the city of Oakland did on the nineteenth day of August, 1907, pass its Resolution No. 32,685 declaring its intention to order the following work and improvement to be done, to wit:

That Cypress street between the northerly line of Eighth street and the southerly line of Ninth street be opened and widened to a uniform width of sixty (60) feet, all being in the city of Oakland, county of Alameda, state of California; and describing in said resolution the lands and premises necessary to be taken therefor, and specifying in said resolution the lands to be affected or benefited by said work and improvement and to be assessed to pay the damages, costs and expenses thereof; and

Whereas, the street superintendent of the city of Oakland did thereupon cause notice of the passage of said resolution to be posted and published for ten days in the manner and as required by law; and

[3] See ante, sec. 685. It will be noted that in Oakland an ordinance ordering the work is used instead of a resolution.

Whereas, no objections have been filed against said proposed work and improvement, and more than ten days have elapsed after the expiration of the time of the publication of said notice of the passage of said resolution, and the council of the city of Oakland has acquired jurisdiction to order said work as proposed in said resolution to be done;

Now, therefore, it is hereby ordered that said work and improvement be done as aforesaid and as specifically described in said Resolution of Intention No. 32,685.

Section 2.—W. F. Kroll, Sam Meyer, R. D. Holmes are hereby appointed commissioners to assess benefits and damages and to have general supervision of said proposed work and improvements until the completion thereof in compliance with law.

Section 3.—This ordinance shall take effect on and after its approval.

§ 1070. Certificate of Appointment of Commissioner.

State of California,
County of Alameda,
City of Oakland,—ss.

I, Frank R. Thompson, city clerk of the city of Oakland, do hereby certify that in accordance with provisions of section 2 of Ordinance No. 2646, entitled "An ordinance ordering the opening and widening of Cypress street between the northerly line of Eighth street and the southerly line of Ninth street, in the city of Oakland, to the uniform width of sixty (60) feet, and appointing three commissioners to assess benefits and damages and to have general supervision of the proposed work," that Sam Meyer is named and appointed as one of said commissioners to assess benefits and damages, and to have general supervision of said work and improvements until the completion thereof in compliance with law.

Said Ordinance No. 2646 was approved by the mayor of the city of Oakland on October 26, 1907, and is in effect from and after the date of its approval.

Witness my hand and the seal of the city of Oakland this second day of November, 1907.

[Seal] FRANK R. THOMPSON,
City Clerk.

State of California,
County of Alameda,
City of Oakland,—ss.

I do solemnly swear that I will support the Constitution of the United States, and the constitution of the state of California, and that I will faithfully discharge the duties of the office of commissioner to assess benefits and damages and to have general supervision of the proposed work and improvements of the opening and widening of Cypress street, between the northerly line of Eighth street and the southerly line of Ninth street, in the city of Oakland, according to the best of my ability.

SAM MEYER.

Subscribed and sworn to before me this second day of November, 1907.

[Seal] FRANK R. THOMPSON,
City Clerk of the City of Oakland.

§ 1071. Bond of Commissioner.

Know All Men by These Presents: That we, W. F. Kroll, as principal, and Joseph T. Hinch and Max W. Koenig, as sureties, are held and firmly bound unto the state of California, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to said state of California, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this sixteenth day of December, 1907.

The condition of the above obligation is such that whereas the above-bounden principal, W. F. Kroll, together with Sam Meyer and R. D. Holmes, was on the twenty-sixth day of October, 1907, by virtue of the provisions of Ordinance No. 2646 passed by the council of the city of Oakland on October 21, 1907, and approved by the mayor of said city on October 26, 1907, appointed commissioner to assess benefits and damages, and to have general supervision of the proposed work and improvements of the opening and widening of Cypress street in said city of Oakland, between the northerly line of Eighth street and the southerly line of Ninth street, and until the completion of said proposed work and improvements in compliance with law:

Now, therefore, if the said W. F. Kroll shall well, truly and faithfully perform the duties of such commissioner in the manner and form required by law, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals the day and year first hereinbefore mentioned.

W. F. KROLL. [Seal]
JOSEPH T. HINCH. [Seal]
MAX W. KOENIG. [Seal]

State of California,
County of Alameda,
City of Oakland,—ss.

Joseph T. Hinch and Max W. Koenig, being duly sworn, each for himself, says: That he is a resident and freeholder within the state of California, and is worth the sum of five thousand dollars, in lawful money of the United States, over and above all just debts and liabilities, exclusive of property exempt from execution.

JOSEPH T. HINCH.
MAX W. KOENIG.

Subscribed and sworn to before me this sixteenth day of December, 1907.

[Notarial Seal] FRED L. BUTTON,
Notary Public in and for the County of Alameda, State of California.

§ 1072. Resolution Approving Bonds of Commissioners.

Whereas, in accordance with Ordinance No. 2646, passed by the council of the city of Oakland, October 21, 1907, and approved by the mayor of said city on October 26, 1907, W. F. Kroll, Sam Meyer and R. D. Holmes were appointed commissioners in the matter of opening and widening Cypress street in the city of Oakland, between the northerly line of Eighth street and the southerly line of Ninth street; and

Whereas, said commissioners have, and each of them has, filed with the city clerk their respective bonds as such commissioners, in the form and of sufficient surety as required by law; now, therefore, be it

Resolved, that said bonds be and each of them is hereby approved.

§ 1073. Report of Commissioners.[4]

Report of commissioners in the matter of opening and widening to a uniform width of sixty feet Cypress street in the city of Oakland, California, between the northerly line of Eighth street and the southerly line of Ninth street, in accordance with Resolution of Intention No. 32,685 of the council of the city of Oakland, adopted August 19, 1907.

To the Honorable, the City Council of the City of Oakland.

Gentlemen: We, the undersigned commissioners appointed in pursuance of Ordinance No. 2646, and entitled "An ordinance ordering the opening and widening of Cypress street, between the northerly line of Eighth street and the southerly line of Ninth street, in the city of Oakland, to the

[4] See ante, secs. 695–697.

uniform width of sixty (60) feet, and appointing three commissioners to assess benefits and damages and to have general supervision of the proposed work," passed by the council of the city of Oakland on October 21, 1907, and approved by the mayor of said city on October 26, 1907, and after proceedings had and taken in, by and before said council under provisions of an act of the legislature of the state of California entitled, "An act to provide for laying out, opening, extending, widening, straightening, and closing up in whole or in part any street, square, lane, alley, court or place, within municipalities, and to condemn and acquire any or all land and property necessary or convenient for that purpose," approved March 6, 1889, beg leave to report as follows, to wit:

That after the passage and approval of said ordinance appointing the undersigned as such commissioners as aforesaid, said commissioners duly qualified according to law, and immediately after their qualification as aforesaid, they met and organized by electing Sam Meyer to act as chairman, and did appoint and employ Frank R. Thompson to act as secretary, and did at said time and place select, appoint and employ W. R. Geary as their attorney and legal adviser, in connection with the matter to come before them.

That forthwith thereafter, the said commissioners named and appointed by the said ordinance, to wit: W. F. Kroll, Sam Meyer and R. D. Holmes, did carefully view the lands described in that certain Resolution of Intention No. 32,685, passed by your Honorable Body August 19, 1907, to wit: the lands in said resolution of intention described as deemed necessary to be taken for said work and improvement, and the improvements affected, and the district and the lands to be affected or benefited by said work and improvement and to be assessed to pay damages, costs and expenses thereof.

That said commissioners did examine witnesses, on oath administered by one of said commissioners, concerning the facts hereinafter mentioned. That said witnesses did give

competent testimony before said commissioners of the value of the land and improvements and property affected by the aforesaid work and improvement, and said commissioners having viewed the lands to be taken and the improvements and property directed by the aforesaid work and improvement, and having considered the testimony given and all the facts and circumstances in the premises, did with all diligence proceed to determine, and did determine, the value of the lands and damages to the improvements and property affected by the aforesaid work and improvement, and also the amount of expenses incident to said work and improvement, and having determined the aforesaid matters and things did proceed to assess and did assess the same upon the district of lands declared benefited, the exterior boundaries of which were fixed by said Resolution of Intention No. 32,685, which said resolution is provided for by section 2 of the statute above referred to.

Said commissioners have hereinafter specified each lot, subdivision, or piece of property taken or injured by the opening and widening or other improvement, or assessed therefor, together with the name of the owner or claimants thereof, or of persons interested therein as lessees, encumbrancers or otherwise, so far as the same are known to such commissioners, and the particulars of their interest, so far as the same can be ascertained, and the amount of value or damage, or the amount assessed, as the case may be. The said assessment was made upon each lot, subdivision or piece of property within the said district in proportion to the benefit to be derived from said work and improvement, by each lot, subdivision, or piece of property therein so far as we could reasonably estimate the same, including in said estimate and assessment the property of all railroad companies within said district.

That the total amount of the value of said lands taken for said work and improvement, together with the damages to said improvements and property affected thereby and the expenses incident to the same as the said total amount has

been assessed by said commissioners, is the sum of four thousand five hundred and nineteen and 65/100 dollars, as will more fully appear from the schedule hereinafter described and hereunto attached, and made a part of this report.

That we have assessed the said sum of four thousand five hundred and nineteen and 65/100 dollars upon the lands within the said district in proportion to the benefits to be derived by said lands from said work and improvement, so far as we can reasonably estimate the same.

That we have made and accompanied this report with a plat of the assessment district, showing the land taken or to be taken for said work and improvement, and the lands assessed, showing the relative location of each district, block, lot or portion of lot and its dimensions, so far as we could reasonably ascertain the same. Each block and lot or portion of lot taken or assessed is designated and described in said plat by an appropriate number, which said number referred to is inclosed within a circle, and said number corresponds with and is identical in number with each said block and lot or portion of lot taken or assessed as mentioned hereinafter or referred to in this report.

Said plat is marked and entitled, "Plat showing lands to be taken for and district to be assessed to pay the expenses of opening and widening Cypress street in the city of Oakland, California, between the northerly line of Eighth street and the southerly line of Ninth street, all as described in, and in compliance with, Resolution of Intention No. 32,685 of the council of said city of Oakland, adopted August 19, 1907. F. C. Turner, City Engineer, Oakland, Cal., January 2, 1908."

That said plat is hereto attached and marked Exhibit "A," and made a part hereof.

We have also made and accompanied this report with a schedule, which is attached hereto and made a part hereof, and marked "Schedule accompanying report of commis-

sioners in the matter of the opening and widening of Cypress street in the city of Oakland."

That in such schedule is made to appear the assessment list, damages awarded, and the expense account in the said matter of opening and widening Cypress street in the city of Oakland, and more particularly as follows, to wit:

Under the subhead entitled "Assessment List" appears a list of lands, subdivisions or pieces of property benefited by said work or improvement; to whom said lands, subdivisions or pieces of property are assessed; number of front feet assessed; rate per front foot of assessment and the amount of assessment.

The first column thereof contains the numbers, which are inclosed in circles on said plat and are the descriptive numbers of the respective blocks and lots or portions of lots written on said plat inclosed in circles, and are the descriptive numbers respectively of said blocks and lots or portions of lots shown on said plat and referred to in this report and in any and all proceedings had or taken hereunder.

The second column under the heading "To Whom Assessed" contains the names of the owners or claimants of the respective lots, subdivisions or pieces of property assessed, or of the persons interested therein as lessees, encumbrancers or otherwise, so far as the same are known to the commissioners, and the particulars of their interest so far as the same can be ascertained. Set forth in said column are the names of the owners respectively of the entire interest in said lot, subdivision or piece of property represented by the number in column 1 opposite each said name respectively as written, and said owners' interests are the only interests in said lots, subdivisions or pieces of property which said commissioners could and can reasonably ascertain.

The third column, under the heading "No. of Front Feet," shows the feet frontage upon public streets in said city of

the several lots, portions of lots or pieces of land so described and represented by the numbers in said first column.

The fourth column, under the heading "Rate Per Front Foot," shows the rate of assessment per front foot so assessed against each of said lots respectively by said commissioners as aforesaid.

The fifth column, under the heading "Amount of Assessment," shows the amount assessed against the respective lots, portions of lots or pieces of land as described by the numbers respectively in the first column and declared to be benefited by said work and improvement.

Under subhead of "Damages Awarded" appears a list of the subdivisions, lots, or portions of lots, or pieces of property taken or to be taken for the extending of said street, in accordance with said resolution of intention hereinabove referred to, as aforesaid.

The first column, under the heading of "Lands Taken," contains the numbers, which are inclosed in circles on said plat and are the descriptive numbers of the respective blocks and lots or portions of lots written on said plat inclosed in circles, and are the descriptive numbers respectively of said blocks, and lots or portions of lots shown on said plat and referred to in this report and in any and all proceedings had or taken hereunder.

The second column, under the heading "Names of Owners," contains the names of the owners or claimants of the respective lots, portions of lots or pieces of property to be taken, as marked and numbered by their said descriptive number each respectively in said first column, and all persons interested therein as lessees, encumbrancers or otherwise, so far as the same are known to the commissioners, and the particulars of their interest respectively so far as the same could and can be by the commissioners ascertained. Set forth in said column are the names of the owners respectively of the entire interest in each said lot, subdivision or piece of property represented by the number in column 1 opposite each said name respectively as written, and said

owners' interests in said lots, subdivisions or pieces of property are the only interests which said commissioners could and can reasonably ascertain.

The third column, under the heading "Value of Land Taken," shows the value of the respective lots so described by said descriptive numbers to be taken respectively.

The fourth column, under the head of "Damage to Improvements," shows the value of the improvements upon said lands and lots as shown by said descriptive numbers respectively.

The fifth column, under the head of "Damages to Property Affected," shows the amount of damage to property damaged by the improvement, but not to be taken therefor.

The sixth column, under the heading "Damages Awarded," shows the total or aggregate damages to the owners respectively of each of said lots respectively.

Under the subhead of "Expense Account" appears a list of the costs and expenses, including the incidental expenses incurred by said commissioners and incident to said work and improvement, all of which said costs and expenses have been incurred excepting those in said list specified as "estimated." And where in said list the amount or item is marked "estimated," such estimate is based upon the cost and expenses of similar work heretofore.

Said commissioners report further, that in obtaining the total amount to be assessed against said lands and property in said district to be assessed for the damages, costs and expenses of said work and improvement, they have added to the aggregate amount of total damages, as awarded by them and shown in said list marked "Damages Awarded," the aggregate amount of expenses, incurred or estimated, as shown by said list marked "Expense Account," which said aggregate of damages awarded and expenses is the aggregate amount to be raised by assessment upon the lands and property to be benefited and assessed as aforesaid, and corresponds to the aggregate of assessments and benefits as shown by said list marked "Assessment List."

Said commissioners report further, that they have set aside a small contingent fund as shown upon said expense account, for the purpose of paying any unforeseen incidental expenses or fees which may be necessary hereafter before the final completion of said work or improvement.

Wherever the abbreviations hereinafter set forth are used in this schedule accompanying the report of the commissioners, or elsewhere in this report, they are defined to mean as follows:

No. means Number; Amt. means Amount; Dolls. means Dollars; Cts. means Cents; N. means North, Northern or Northerly; S. means South, Southern or Southerly; W. means West, Western or Westerly; E. means East, Eastern or Easterly; N. W. means Northwest, Northwestern or Northwesterly; N. E. means Northeast, Northeastern or Northeasterly; S. E. means Southeast, Southeastern or Southeasterly; S. W. means Southwest, Southwestern or Southwesterly; Ft. means Feet; In. means Inches; Com. means Commencing or Commencement; Beg. means Beginning; Tr. means Trace; Blk. means Block. Wherever the character "$" is used it means Dollars.

Respectfully submitted,

SAM MEYER,
R. D. HOLMES,
W. F. KROLL,
Commissioners.

Oakland, California, May 4, 1908.

EXHIBIT "B."

Schedule accompanying report of commissioners in the matter of opening and widening Cypress street in the city of Oakland.

Assessment List.

The lot numbers in first column refer to the several lots as numbered on the plat attached hereto and hereby made

a part hereof, and are the "Descriptive Numbers" of each of said lots respectively.

Lot No.	To Whom Assessed	No. of Front Feet	Rate Per Front Foot	Amount of Assessment
1	C. F. Grassell	30.21	$2 50	$ 75 52
2	Margaret Weber	30.50	2 50	76 25
3	Thos. Hill	55.58	2 50	138 95

Damages Awarded.

Lands Taken	Names of Owners	Value of Lands Taken	Damages to Improvements	Damages to Property Affected	Damages Awarded
62	Mary E. Dearing	$1,000 00	$500 00	None	$1,500 00
63	Mary E. Lincoln	2,200 00	None	None	2,200 00
			Total Da	mages,	$3,700 00

To which is to be added the following:

Expense Account.

Engineer's fees, making plats	$ 25 00
Certificate of title	45 00
Witness fees, expert testimony	30 00
Attorney's fees	115 00
Salary of secretary, clerical work, typewriting and tabulating	85 00
Salary of commissioners, estimated	375 00
Contingent fund, estimated	104 69
	$819 69

SAM MEYER,
R. D. HOLMES,
W. F. KROLL,
Commissioners.

Oakland, California, May 4, 1908.

§ 1074. Resolution Directing Notice of Filing Report.

Resolved, by the city council of the city of Oakland, that the clerk of said council be and he is hereby authorized and

directed to give notice of the filing of the report of the commissioners in the matter of opening and widening Cypress street in said city, between the northerly line of Eighth street and the southerly line of Ninth street, as per Resolution of Intention No. 32,685, adopted August 19, 1907, and Ordinance No. 2,646 passed by said council on October 26, 1907, by publication of notice in the manner and form required by law for at least ten days in the Oakland "Enquirer," a daily newspaper printed, published and circulated in said city and hereby designated for that purpose, requiring all persons interested to show cause, if any, on or before a date to be fixed by said clerk why said report should not be confirmed before said city council.

§ 1075. Notice of Filing Report.[5]

PUBLIC NOTICE.

Notice is hereby given: That whereas, in pursuance to ordinance of the city of Oakland, No. 2646, and entitled, "An ordinance ordering the opening and widening of Cypress street between the northerly line of Eighth street and the southerly line of Ninth street, in the city of Oakland, to a uniform width of sixty (60) feet, and appointing three commissioners to assess benefits and damages and to have general supervision of the proposed work," which said ordinance was passed by the council of the city of Oakland on October 21, 1907, and approved by the mayor of said city on October 26, 1907, W. F. Kroll, Sam Meyer and R. D. Holmes were appointed commissioners to assess benefits and damages and have general supervision of the proposed work or improvement referred to in said Ordinance No. 2646 until the completion of said proposed work or improvement in compliance with law and the statutes in such cases made and provided; and

Whereas, said commissioners have made their assessment of benefits and damages and have made a written report

[5] See ante, sec. 698.

thereof to the city council of the city of Oakland and have attached to said report a plat of the assessment district showing the lands to be taken for the said work or improvement and the lands assessed, showing the relative location of each district, block, lot, or portion of lot, and its dimensions so far as the commissioners can reasonably ascertain the same, and that said commissioners have done all things by law required of them to be done, and that said report and plat contain all matters required therein to be done in the matter, form and substance as required by law;

Now, therefore, public notice is given that said report and plat were filed in the clerk's office of the city council of the city of Oakland on the fourth day of May, 1908, and in pursuance of statute made and provided, the undersigned, Frank R. Thompson, city clerk and clerk of the council of the city of Oakland, gives notice of said filing of said report and plat, and notice is hereby given that any and all persons interested show cause before the council of the city of Oakland on or before Friday, the twelfth day of June, 1908, and up to the hour of 5 o'clock P. M. of said last-named date, why said report should not be confirmed, and that said last-named day is fixed by the clerk for that purpose.

All objections shall be in writing and filed with the clerk of the city council at the office of said clerk at the City Hall in the city of Oakland, county of Alameda, state of California.

Reference is hereby made to Oakland City Council Resolution No. 32,685 and Ordinance No. 2646, and report of said commissioners, all of which are on file in the office of the city clerk and clerk of said city council for further particulars.

Dated Oakland, Cal., May 11, 1908.

FRANK R. THOMPSON,

City Clerk and Clerk of the Council of the City of Oakland.

§ 1076. Resolution Adopting Report.[6]

Resolved, that the report of the commissioners in the matter of the opening and widening of Cypress street between the northern line of Eighth street and the southern line of Ninth street in the city of Oakland, filed in the office of the clerk of the council of said city on May 4, 1908, together with the plat accompanying said report, be and they are hereby confirmed, approved and adopted; and be it further

Resolved, that the clerk of this council be and he is hereby directed to file in the office of the county recorder of Alameda county, California, a copy of said plat appropriately designated, and said clerk is hereby directed to forward to the superintendent of streets of said city of Oakland a certified copy of the report, assessment and plat of said commissioners as hereby finally confirmed, approved and adopted by this council.

§ 1077. Superintendent's Notice Requiring Payment of Assessment.[7]

FORTY-SECOND STREET OPENING.

Street Superintendent's Notice Requiring Payment of Assessment.

Office of the Superintendent of Streets, Oakland, California.
December 1, A. D. 1910.

In compliance with the law, notice is hereby given, that on the thirtieth day of November, A. D. 1910, I received from the city clerk and clerk of the council of the city of Oakland, a certified copy of the written report, assessment and plat accompanying same, made by the commissioners appointed by the council of the city of Oakland, to assess benefits and damages and have general supervision of the proposed work and improvement of opening Forty-second

[6] See ante, sec. 701.
[7] See ante, sec. 703.

street in the city of Oakland, to a uniform width of sixty (60) feet westerly from the western line of West street to a line parallel to the eastern line of Market street and distant three hundred and forty (340) feet easterly therefrom in accordance with Resolution of Intention No. 34,474 of the council of the city of Oakland, adopted November 16, 1908, which said report, assessment and plat were filed by the commissioners in the office of said clerk of said council of the city of Oakland, on the tenth day of October, A. D. 1910, which said report, assessment and plat were finally confirmed, approved and adopted by the council of the city of Oakland at a meeting of said council held on the twenty-first day of November, A. D. 1910, by its Resolution No. 37,419, and that said assessment therein contained is now due and payable and is a lien upon all property contained and described therein and is therein assessed for a proportion of the cost of said improvement as shown by said report, assessment and plat now on file in my office.

Notice is also given that all sums levied and assessed in and by said assessment-roll, are due and payable immediately and that the payment of each said sums, respectively, is to be made to me within thirty (30) days from the date of the first publication of this notice, to wit: On or before the thirty-first day of December, A. D. 1910; which said date is thirty (30) days from the first day of December, A. D. 1910, and that all assessments not paid before the expiration of said thirty (30) days will become and will be declared to be delinquent and that thereafter the sum of five (5) per cent on the amount of each such delinquent assessment, together with the cost of advertising each such delinquent assessment will be added thereto.

Oakland, California, this first day of December, A. D. 1910.

CHARLES S. WARNER,

Superintendent of Streets of said City of Oakland, and Street Superintendent of said City of Oakland.

§ 1078. Delinquent List and Notice of Sale.[s]

FORTY-SECOND STREET OPENING.

Notice of Sale—Delinquent List.

Office of the Superintendent of Streets of the City of Oakland, County of Alameda, State of California, January 5, A. D. 1911.

Public notice is hereby given that default having been made in the payment of the several amounts due upon the real property hereinafter described and assessed thereon for the cost and expenses of opening Forty-second street in the city of Oakland, from the western line of West street to a line parallel to and distant three hundred and forty feet easterly from the eastern line of Market street in accordance with Resolution of Intention No. 34,474 of the council of the city of Oakland, adopted November 16, A. D. 1908, as per report of commissioners filed with the clerk of said council of said city on the tenth day of October, A. D. 1910, and as finally confirmed, approved and adopted by the council of the city of Oakland at a meeting of said council held on the twenty-first day of November, A. D. 1910, by its Resolution No. 37,419.

Now, therefore, I, Charles S. Warner, superintendent of streets of the said city of Oakland, will on the sixth day of February, A. D. 1911, at the hour of 10 A. M. in my office, being in the building known and designated as 1358 Broadway, Oakland, Cal. (now being used as a temporary City Hall), of said city, commence to sell said real property at public auction unless the assessments delinquent, together with the costs of advertising, at the rate of fifty (50) cents per lot, piece or parcel of land, separately assessed and advertised as delinquent, and percentages, are paid, and that I will continue said sale until the whole property set forth hereinafter, or so much thereof as may be necessary shall be sold, and that I will sell the smallest quantity of each

[s] See ante, secs. 706, 707.

lot, piece or parcel of said real property that will be taken by any person for the amount of the assessment, percentages and said costs of advertising remaining due and unpaid thereon, together with the sum of fifty (50) cents provided by law, for each certificate of sale.

Conditions: Real property will be sold, subject to redemption within twelve (12) months from the date of the sale by payment to the purchaser or the superintendent of streets of the said city of Oakland, of the purchase money and fifty (50%) per cent in addition thereto; but if not so redeemed, absolute conveyance of the real property so sold will be made to the purchaser or his assignee, provided notice shall have been given as required by section 3785 of the Political Code of the state of California as said section existed on the first day of January, A. D. 1895; otherwise upon the purchaser or his assignees having fully complied with the provisions of the said section, applicable thereto.

In the event of a sale being made through error on the part of the superintendent of streets, the money received from the purchaser will be refunded to him or his assignee, and such sale will be canceled.

Notice: The numbers in the first column denote the several lots, pieces or parcels of land, designated by the corresponding numbers upon that certain plat entitled, "Plat showing lands to be taken for and district to be assessed, to pay the expenses of opening Forty-second street in the city of Oakland, California, westerly from the western line of West street, to a line parallel to the eastern line of Market street and distant three hundred and forty (340) feet easterly therefrom, all as described in and in compliance with Resolution of Intention No. 34,474 of the council of said city of Oakland, adopted November 16, 1908, Oakland, Cal., March, 1909." Recorded in the office of the county recorder of said Alameda county, on the thirtieth day of November, A. D. 1910, and are respectively the descriptive numbers of each lot, piece or parcel of land upon which said assessment is delinquent. The names following said numbers are the

names of the persons designated in said report as the owners of the respective parcels of land herein next immediately preceding said name, respectively, and where not known are designated as "unknown" and the figures following each name and respectively preceded by the sign or abbreviation "$" denotes dollar or dollars, and the two last figures of each account set after, opposite, and following each name, respectively, denotes cents.

Numbers.	Names.	Amounts.
11	E. L. Webber	$ 13 67
40	Lydia F. Shepardson	13 63
41	Lydia F. Shepardson	13 63
42	A. McMullan	13 63
43	Lydia F. Shepardson	8 38
130	P. Bertin	11 53
179	A. O. Gardiner	86 88
180	Mary A. Strehl	279 53
187	Honora O'Connell	175 56
188	Honora O'Connell	57 50
198	California College	35 94
206	Mary A. Belden	53 00
221	M. A. Daggett	4 89
224	M. A. Daggett	18 21
229	Anthony Gallagher	26 75
230	Christina Bayly	24 13
230½	Christina Bayly	24 13

Oakland, California, January 5, A. D. 1911.

CHARLES S. WARNER,

Superintendent of Streets of the City of Oakland and Street Superintendent of the City of Oakland.

§ 1079. Certificate of Sale.

Certificate No. 1. Lot No. 11. Duplicate.

CERTIFICATE OF SALE OF REAL ESTATE.

Sold for Nonpayment of Assessment for Opening and Widening Forty-second Street in the City of Oakland, from the Western Line of West Street to a Line Parallel to and Distant Three Hundred and Forty Feet from the Eastern Line of Market Street.

State of California,
County of Alameda,
City of Oakland,—ss.

I, Charles S. Warner, superintendent of streets of the said city of Oakland, do hereby certify: That on the thirtieth day of November, 1910, the clerk of the council of the said city of Oakland did forward to me, and did cause to be filed in my office, a certified copy of the report, assessment, and plat in the matter of the opening and widening of Forty-second street from the western line of West street to a line parallel to and distant three hundred and forty feet from the eastern line of Market street in said city, as finally confirmed and adopted by the said city council; that I did thereupon give notice by publication for ten days in a daily newspaper, published and circulated in said city of Oakland, that I had received said assessment-roll, and that all sums levied and assessed in said assessment-roll were due and payable immediately, and that the payment of said sums was to be made to me within thirty days from the date of the first publication of said notice; that said notice also contained a statement that all assessments not paid before the expiration of said thirty days would be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, would be added thereto; that said notice was published in the Oakland "Enquirer," a daily newspaper published and circulated in said

city of Oakland, on December 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 1910; that, on the expiration of said thirty days all assessments then unpaid having by law become delinquent, I did certify the fact of such delinquency at the foot of said assessment-roll, and did add five per cent to the amount of each assessment so delinquent; that, within five days from the date of said delinquency, I did proceed to advertise and collect the various sums delinquent, and the whole thereof, including the cost of advertising, by the sale of the assessed property, in the manner provided by law; that, after the date of said delinquency, no assessment was received unless at the same time the five per cent added thereto, as aforesaid, together with the costs of advertising, then already incurred, was paid therewith; that said list of delinquent assessments was published daily for five days in a daily newspaper published and circulated in such city, before the day of sale of such delinquent assessment; that said publication was made in the said Oakland "Enquirer," on January 5, 6, 7, 9, 10, 1911; that the time of sale fixed in said notice was on the sixth day of February, 1911, and the place fixed in said notice was in my office; that at said place I did on the sixth day of February, 1911, in accordance with law, offer for sale at public auction, the least quantity or smallest portion of that certain parcel of land assessed to John Doe, situate, lying and being in the city of Oakland, county of Alameda, state of California, and designated as Lot number 11, as the same is delineated and designated upon that certain map or plat entitled [Name of map], etc., filed in the office of the county recorder of said Alameda county on the first day of May, 1900; that at the time of said sale, the assessment upon said parcel of land, together with five per cent for delinquency and costs of advertising was wholly unpaid; that at said sale Richard Roe was the bidder who was willing to take the least quantity or the smallest portion of the said land and pay the assessment and costs due thereon, which assessment, percentage, and costs, including fifty cents for this certificate, amounted to

the sum of twenty and 00/100 dollars; that the said least quantity or smallest portion of the said land, situate, lying and being in the city of Oakland, county of Alameda, state of California, as is hereinafter described, to wit: all of the above-described real property was by me, Charles S. Warner, superintendent of streets as aforesaid, struck off to the said Richard Roe, who paid the full amount of said assessment, percentage and costs, and thereupon became the purchaser of the last described piece or parcel of land; and I do further certify that the said real estate last aforesaid was sold subject to redemption, pursuant to the statute in such cases made and provided, and that a redemption of the property sold may be made by the owner or any party in interest within twelve months from the time of purchase, and at any time prior to the giving of the notice of application for a deed, the making of proof thereof, and the making application for a deed, all as provided for in section 3785 of the Political Code of California, as the same existed on the first day of January, 1895; and if the property is not redeemed within the time allowed by law for its redemption, as aforesaid, the purchaser will, upon the expiration of said time, be entitled to a deed of said property.[9]

Given under my hand this —— day of ————, 19—.

————————, [Seal]

Superintendent of Streets of the City of Oakland.

[9] The essential statement of the time when the purchaser will be entitled to a deed is somewhat complicated. The requirement is stated in Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816, as follows: "By the provisions of section 3785 it is expressly provided that 'the owner of the property shall have the right of redemption indefinitely until such notice (i. e., the notice prescribed) shall have been given and said deed applied for.' The term of redemption should, therefore, have been described as the concurrent happening of this event, and of the expiration of the year." An attempt to follow the language of the court in the form is beset with difficulties. I believe the statement given complies with the requirements of the law.

As to the certificate, see ante, secs. 711, 712.

As to redemption, see ante, secs. 713, 714.

As to notice of application for a deed, see ante, secs. 714–716.

For value received, I hereby assign, transfer, convey and set over unto ————, heirs and assigns, all my right, title and interest in and to the within certificate of sale (and the duplicate thereof) of real estate, sold for nonpayment of the assessment for ———— in the city of Oakland, numbered ———.

To have and to hold the same unto the said ————, heirs and assigns forever, with full power and authority to demand and receive in —— own name or otherwise, a deed therefor, or to otherwise use or dispose of at pleasure.

Witness my hand and seal, at ———, this —— day of ————, A. D. 19—.

————————. [Seal]

State of California,
——— County of ———, —ss.

On this —— day of ————, in the year of our Lord, nineteen hundred and ——, before me, ————, a notary public in and for the said ——— County ———, duly commissioned and qualified, and residing therein, personally appeared ————, personally known to me to be the person— described in, whose name— subscribed to, and who executed the within instrument, and —he— acknowledged to me that —he— executed the same.

Witness my hand and official seal, at my office in the said ——— county the day and year in this certificate first above written.

————————,
Notary Public, in and for the ——— County of ———, State of California.

APPENDIX.

(985)

I. Text of the General Statutes, p. 987.

II. Text of the Charter Provisions, p. 1110.

III. Text of Provisions of Special Acts Incorporating Cities, p. 1186.

IV. Text of the General Taxation Statutes, p. 1199.

APPENDIX.

I. TEXT OF THE GENERAL STATUTES.

1. The Vrooman Act, p. 987.
2. The Bond Act, p. 1016.
3. Improvement Act of 1911, p. 1023.
4. Local Improvement Act of 1901, p. 1056.
5. Change of Grade Act of 1909, p. 1065.
6. Street Improvement Act of 1909, p. 1069.
7. The Tree Planting Act, p. 1081.
8. Street Lighting Act, p. 1085.
9. Street Opening Act of 1889, p. 1090.
10. Street Opening Act of 1903, p. 1098.

1. The Vrooman Act.

An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities.

[Approved March 18, 1885. Stats. 1885, p. 147.]

Amended 1887, p. 148; 1889, p. 157; 1891, pp. 116, 196, 461; 1893, pp. 33, 89, 172; 1899, p. 23; 1903, p. 88; 1905, pp. 15, 68; 1907, pp. 126, 1000; 1909, pp. 31, 399, 1017, 1911.

Part I.

§ 1. All streets, lanes, alleys, places, or courts, in the municipalities of this state now open or dedicated, or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places, or courts, for the purposes of this act, and the city council of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in section 2 of this act, under the proceedings hereinafter described.

§ 2. Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any portion, either in length or width, of any one or more of the streets, avenues, lanes, alleys, courts, places, boulevards, highways, crossings, intersections or public ways of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and to order the construction or reconstruction therein of sidewalks, crosswalks, culverts, bridges, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage pur-

poses or either or both thereof, with outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection, tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water, and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting the same, the planting of trees thereon and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places or public ways or property or rights of way of such city. [Amendment approved April 5, 1911.]

§ 3. Before ordering any work done or improvement made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, and describing the work, which shall be posted conspicuously for two days on or near the chamber door of said council, and published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing or any part thereof, in front of each quarter block and irregular block liable to be assessed, notices of the passage of said resolution. Said notice shall be headed "Notice of Street Work," in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated. In case there is no such paper published in said city, said notice shall be posted for six days on or near the chamber door of said council, and in two other conspicuous places in said city, as hereinafter provided. The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and such objections so delivered and indorsed shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvements, unless the owners of the one-half or more of the frontage, as aforesaid, shall mean-

while petition for the same to be done. At any time before the issuance of the assessment-roll, all owners of lots or lands liable to assessment therein, who, after the first publication of said resolution of intention, may feel aggrieved, or who may have objections to any of the subsequent proceedings of said council in relation to the performance of the work mentioned in said notice of intention, shall file with the clerk a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object; such petition or remonstrance shall be passed upon by the said city council, and its decision therein shall be final and conclusive. But when the work or improvement proposed to be done is the construction of sewers, manholes, culverts, or cesspools, cross-walks, or sidewalks, curbs and gutters, and the objection thereto is signed by the owners of a majority of the frontage liable to be assessed for the expense of said work, as aforesaid, the said city council shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector, or his agent, when he appears for such objector. At the time specified said city council shall hear the objections urged, and pass upon the same, and its decisions shall be final and conclusive, and the said bar for six months to any further proceedings shall not be applicable thereto. And when not more than two blocks, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon said street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, said city council may order any of the work mentioned in this act to be done upon said intervening ungraded or unimproved part of said street, or at the end of a street, and said work upon said intervening part, or at the end of a street, shall not be stayed or prevented by any written or other objection unless such council shall deem proper. And if one-half or more in width or in length, or as to grading, one-half or more of the grading work of any street lying and being between two successive main street crossings, or if a crossing has been already partially graded or improved as aforesaid, said council may order the remainder improved, graded or otherwise, notwithstanding such objections of property owners. At the expiration of twenty days after the expiration of the time of said publication by said street superintendent, and at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention, if no written objection to the work therein described has been delivered, as aforesaid, by the owners of a major frontage of the property fronting on said proposed work or improvement, or if any written objection purporting to be signed by the owners of a major frontage is disallowed by said council, as not of itself barring said work for six months, because in its judgment, said objection has not been legally signed by the owners of a majority of said frontage, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act; which order, when made, shall be published for two days, the same as provided for the publication of the resolution of intention. Before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by

the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him. Whenever the contemplated work of improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment-roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof. Objections to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may be made by interested parties, in writing, within ten days after the expiration of the time of the publication of the notice of the passage of the resolution of intention. The city clerk shall lay said objections before the city council, which shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector. At the time specified the city council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If the objections are sustained, all proceedings shall be stopped; but proceedings may be immediately again commenced by giving the notice of intention to do the said work or make said improvements. If the objections are overruled by the city council, the proceedings shall continue the same as if such objections had not been made. [Amendment approved March 6, 1905. Stats. 1905, p. 63. In effect in sixty days.]

§ 4. The owners of a majority in frontage of lots and lands fronting on any street, avenue, lane, alley, place, or court, or of lots or lands liable to be assessed for the expense of the work petitioned to be done, or their duly authorized agents, may petition the city council to order any of the work mentioned in this act to be done, and the city council may order the work mentioned in said petition to be done, after notice of its intention so to do has been posted and published as provided in section 3 of this act. [Amendment approved March 31, 1891. Stats. 1891, p. 199.]

§ 5. Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall cause notice, with specifications, to be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work inviting said posted as hereinbefore provided. All proposals or bids offered shall be lished for two days in a daily, semi-weekly, or weekly newspaper, published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. All proposals or bids offered shall be accompanied by a check payable to the order of the mayor of the city, certified by a responsible bank, for an amount which shall not be less than ten

per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and by two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall, in open session, examine and publicly declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satisfactory to the council. The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent and unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid, which award shall be approved by the mayor or a three-fourths vote of the city council. If not approved by him, or a three-fourths vote of the city council, without further proceedings, the city council may re-advertise for proposals or bids for the performance of the work as in the first instance, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bids so rejected. But the checks accompanying such accepted proposals or bids shall be held by the city clerk of said city until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage, whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city, and shall be collected by it and paid into its fund for repairs of streets; any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund. Notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work. It shall be published for two days in a daily newspaper published and circulated in said city and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such city, then such notice of award shall only be kept posted as hereinbefore provided. The owners of three-fourths of the frontage of lots and lands upon the street whereon said work is to be done, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first posting and publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first posting and publication of said award, and to prosecute the same with diligence to completion, it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid. But if such original bidder neglects, fails or refuses, for fifteen days after the first posting and publication of notice of

award, to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids as in the first instance, and award the contract of said work to the then lowest regular bidder. The bids of all persons and the election of all owners, as aforesaid, who have failed to enter into the contract as herein provided, shall be rejected in any bidding or election subsequent to the first for the same work. If, however, the owner or contractor, who may have taken any contract, do not complete the same within the time limited in the contract, or within such further time as the city council may give them, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance. All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets of said city, with two or more sureties and payable to such city, in such sums as the mayor shall deem adequate, conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above all statutory exemptions. Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of publication of notices, resolutions, orders, or other incidental expenses and matters required under the proceedings prescribed in this act, and such other notices as may be deemed requisite by the city council; provided, however, that all contracts entered into between the owners of any property and the contractor or his agents to perform the work of improvement on any street, alley, lane, avenue, place, or court, shall be in triplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the city, one copy thereof shall be held by the contractor or his agent, and one copy thereof duplicate shall be held by the owners. And in case the work is abandoned by the city before the letting of the contract, the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury. [Amendment approved April 10, 1911.]

§ 5½. At any time within ten days from the date of the first publication of the notice of award of contract, any owner of or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding, prior to the date of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, excepting as to matters directly affecting the jurisdiction of the council to order the said work or improvement. [New section approved February 20, 1909. Stats. 1909, p. 31. In effect immediately.]

§ 6. The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and receive all bonds authorized

by this act, and to do any other act, either express or implied, that pertains to the street department under this act; and he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the city council. The work provided for in section 2 of this act must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, and all contracts made therefor must contain a provision to that effect, and also express notice that, in no case, except where it is otherwise provided in this act, will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made. The assessment and apportionment of the expenses of all such work or improvement shall be made by the superintendent of streets in the mode herein provided.

§ 6½. Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor on, or furnish materials to be used in the said work of improvement, and shall provide that if the contractor, person, company, or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company, or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof. [New section approved February 21, 1899. Stats. 1899, p. 23.]

§ 7. Subdivision One.—The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include

work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as herein specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

Subdivision Two.—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

Subdivision Three.—Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main streets, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Subdivision Four.—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Five.—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Six.—Where a subdivision street, avenue, lane, alley, place or court terminates in another street, avenue, lane, alley, place or court, the expense of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, avenue, lane, alley, place or court so terminating, according to its frontage thereon, halfway, on each side, respectively, to the next street, avenue, lane, alley, place or court or to the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

Subdivision Seven.—Where any work mentioned in this act (manholes, sewers, cesspools, culverts, crosswalks, piling and capping excepted) is done on one side of the center line of any street, or sewering or resewering is ordered to be done under the sidewalk on only one side of any street for any length thereof, the assessment for the expenses thereof shall be made only upon the lots and lands fronting nearest upon that side of the street and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

Subdivision Eight.—Whenever any lot, piece or parcel of land belonging to the United States or to the state of California, or any lot, piece or parcel of land belonging to any county, city, public agent, mandatory of the government, school board, educational, penal or reform institution or institution for the feeble-minded or the insane, and being in use in the performance

of any public function, fronts upon the proposed work or improvement or is included within the district declared by the city council in the resolution of intention to be the district to be assessed to pay the costs and expenses thereof, the city council may, in its discretion, in the resolution of intention, declare that said lots, pieces or parcels of land so owned and in use, or any of them, shall be omitted from the assessment to be made to cover the costs and expenses of said work or improvement. In the event that said lots, pieces or parcels of land, or any of them, shall, by said resolution be omitted from the assessment then the total expense of all work done shall be assessed on the remaining lots fronting on the work or improvement or lying within the limits of the assessment district without regard to such omitted lots, pieces or parcels of land. In the event the city council shall, in its resolution of intention, declare that the said lots, pieces or parcels of land so owned and in use, or any of them, shall be included in the assessment, or in the event that no declaration is made respecting such lots, pieces or parcels of land, then such sum or sums as thereafter may be assessed against such lots, pieces or parcels of land, so owned and used, shall be payable by the city out of the general fund, unless the council shall in its resolution of intention designate another fund and the contract for said work or improvement thereafter made shall contain a provision to that effect.

Subdivision Nine.—It shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform, at his or their own expense (after obtaining permission from the council so to do, but before said council has passed its resolution of intention to order grading inclusive of this), any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon to procure, at his or their own expense, a certificate from the city engineer, setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter to file said certificate with the superintendent of streets, which certificate the superintendent shall record in a book kept for that purpose in his office, properly indexed. Whenever thereafter the city council orders the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contracts must express the price by the cubic yard for cutting and filling in grading; and the said owner or owners and his or their successors in interest, shall be entitled to credit, on the assessment upon his or their lots and lands fronting on said streets for the grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been duly altered, only for so much of said certified work as would be required for grading to the altered grade; provided, however, that such owner or owners shall not be entitled to such credit as may be in excess of the assessments for grading upon the lots and lands owned by him or them, and proportionately assessed for the whole of said grading; and the superintendent of streets shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the duly altered grade so much of said certified work as would be required for grading thereto, and shall enter

poses or either or both thereof, with outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection, tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water, and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting the same, the planting of trees thereon and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places or public ways or property or rights of way of such city. [Amendment approved April 5, 1911.]

§ 3. Before ordering any work done or improvement made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, and describing the work, which shall be posted conspicuously for two days on or near the chamber door of said council, and published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing or any part thereof, in front of each quarter block and irregular block liable to be assessed, notices of the passage of said resolution. Said notice shall be headed "Notice of Street Work," in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated. In case there is no such paper published in said city, said notice shall be posted for six days on or near the chamber door of said council, and in two other conspicuous places in said city, as hereinafter provided. The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and such objections so delivered and indorsed shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvements, unless the owners of the one-half or more of the frontage, as aforesaid, shall mean-

while petition for the same to be done. At any time before the issuance of the assessment-roll, all owners of lots or lands liable to assessment therein, who, after the first publication of said resolution of intention, may feel aggrieved, or who may have objections to any of the subsequent proceedings of said council in relation to the performance of the work mentioned in said notice of intention, shall file with the clerk a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object; such petition or remonstrance shall be passed upon by the said city council, and its decision therein shall be final and conclusive. But when the work or improvement proposed to be done is the construction of sewers, manholes, culverts, or cesspools, cross-walks, or sidewalks, curbs and gutters, and the objection thereto is signed by the owners of a majority of the frontage liable to be assessed for the expense of said work, as aforesaid, the said city council shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector, or his agent, when he appears for such objector. At the time specified said city council shall hear the objections urged, and pass upon the same, and its decisions shall be final and conclusive, and the said bar for six months to any further proceedings shall not be applicable thereto. And when not more than two blocks, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon said street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, said city council may order any of the work mentioned in this act to be done upon said intervening ungraded or unimproved part of said street, or at the end of a street, and said work upon said intervening part, or at the end of a street, shall not be stayed or prevented by any written or other objection unless such council shall deem proper. And if one-half or more in width or in length, or as to grading, one-half or more of the grading work of any street lying and being between two successive main street crossings, or if a crossing has been already partially graded or improved as aforesaid, said council may order the remainder improved, graded or otherwise, notwithstanding such objections of property owners. At the expiration of twenty days after the expiration of the time of said publication by said street superintendent, and at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention, if no written objection to the work therein described has been delivered, as aforesaid, by the owners of a major frontage of the property fronting on said proposed work or improvement, or if any written objection purporting to be signed by the owners of a major frontage is disallowed by said council, as not of itself barring said work for six months, because in its judgment, said objection has not been legally signed by the owners of a majority of said frontage, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act; which order, when made, shall be published for two days, the same as provided for the publication of the resolution of intention. Before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by

the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him. Whenever the contemplated work of improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment-roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof. Objections to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may be made by interested parties, in writing, within ten days after the expiration of the time of the publication of the notice of the passage of the resolution of intention. The city clerk shall lay said objections before the city council, which shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector. At the time specified the city council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If the objections are sustained, all proceedings shall be stopped; but proceedings may be immediately again commenced by giving the notice of intention to do the said work or make said improvements. If the objections are overruled by the city council, the proceedings shall continue the same as if such objections had not been made. [Amendment approved March 6, 1905. Stats. 1905, p. 63. In effect in sixty days.]

§ 4. The owners of a majority in frontage of lots and lands fronting on any street, avenue, lane, alley, place, or court, or of lots or lands liable to be assessed for the expense of the work petitioned to be done, or their duly authorized agents, may petition the city council to order any of the work mentioned in this act to be done, and the city council may order the work mentioned in said petition to be done, after notice of its intention so to do has been posted and published as provided in section 3 of this act. [Amendment approved March 31, 1891. Stats. 1891, p. 199.]

§ 5. Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall cause notice, with specifications, to be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work inviting said posted as hereinbefore provided. All proposals or bids offered shall be lished for two days in a daily, semi-weekly, or weekly newspaper, published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. All proposals or bids offered shall be accompanied by a check payable to the order of the mayor of the city, certified by a responsible bank, for an amount which shall not be less than ten

per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and by two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall, in open session, examine and publicly declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satisfactory to the council. The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent and unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid, which award shall be approved by the mayor or a three-fourths vote of the city council. If not approved by him, or a three-fourths vote of the city council, without further proceedings, the city council may re-advertise for proposals or bids for the performance of the work as in the first instance, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bids so rejected. But the checks accompanying such accepted proposals or bids shall be held by the city clerk of said city until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage, whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city, and shall be collected by it and paid into its fund for repairs of streets; any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund. Notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work. It shall be published for two days in a daily newspaper published and circulated in said city and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such city, then such notice of award shall only be kept posted as hereinbefore provided. The owners of three-fourths of the frontage of lots and lands upon the street whereon said work is to be done, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first posting and publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first posting and publication of said award, and to prosecute the same with diligence to completion, it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid. But if such original bidder neglects, fails or refuses, for fifteen days after the first posting and publication of notice of

award, to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids as in the first instance, and award the contract of said work to the then lowest regular bidder. The bids of all persons and the election of all owners, as aforesaid, who have failed to enter into the contract as herein provided, shall be rejected in any bidding or election subsequent to the first for the same work. If, however, the owner or contractor, who may have taken any contract, do not complete the same within the time limited in the contract, or within such further time as the city council may give them, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance. All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets of said city, with two or more sureties and payable to such city, in such sums as the mayor shall deem adequate, conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above all statutory exemptions. Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of publication of notices, resolutions, orders, or other incidental expenses and matters required under the proceedings prescribed in this act, and such other notices as may be deemed requisite by the city council; provided, however, that all contracts entered into between the owners of any property and the contractor or his agents to perform the work of improvement on any street, alley, lane, avenue, place, or court, shall be in triplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the city, one copy thereof shall be held by the contractor or his agent, and one copy thereof duplicate shall be held by the owners. And in case the work is abandoned by the city before the letting of the contract, the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury. [Amendment approved April 10, 1911.]

§ 5½. At any time within ten days from the date of the first publication of the notice of award of contract, any owner of or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding, prior to the date of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, excepting as to matters directly affecting the jurisdiction of the council to order the said work or improvement. [New section approved February 20, 1909. Stats. 1909, p. 31. In effect immediately.]

§ 6. The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and receive all bonds authorized

by this act, and to do any other act, either express or implied, that pertains to the street department under this act; and he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the city council. The work provided for in section 2 of this act must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, and all contracts made therefor must contain a provision to that effect, and also express notice that, in no case, except where it is otherwise provided in this act, will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made. The assessment and apportionment of the expenses of all such work or improvement shall be made by the superintendent of streets in the mode herein provided.

§ 6½. Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor on, or furnish materials to be used in the said work of improvement, and shall provide that if the contractor, person, company, or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company, or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof. [New section approved February 21, 1899. Stats. 1899, p. 23.]

§ 7. Subdivision One.—The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include

work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as herein specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

Subdivision Two.—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

Subdivision Three.—Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main streets, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Subdivision Four.—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Five.—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Six.—Where a subdivision street, avenue, lane, alley, place or court terminates in another street, avenue, lane, alley, place or court, the expense of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, avenue, lane, alley, place or court so terminating, according to its frontage thereon, halfway, on each side, respectively, to the next street, avenue, lane, alley, place or court or to the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

Subdivision Seven.—Where any work mentioned in this act (manholes, sewers, cesspools, culverts, crosswalks, piling and capping excepted) is done on one side of the center line of any street, or sewering or resewering is ordered to be done under the sidewalk on only one side of any street for any length thereof, the assessment for the expenses thereof shall be made only upon the lots and lands fronting nearest upon that side of the street and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

Subdivision Eight.—Whenever any lot, piece or parcel of land belonging to the United States or to the state of California, or any lot, piece or parcel of land belonging to any county, city, public agent, mandatory of the government, school board, educational, penal or reform institution or institution for the feeble-minded or the insane, and being in use in the performance

of any public function, fronts upon the proposed work or improvement or i included within the district declared by the city council in the resolutio of intention to be the district to be assessed to pay the costs and expense thereof, the city council may, in its discretion, in the resolution of inten tion, declare that said lots, pieces or parcels of land so owned and in use or any of them, shall be omitted from the assessment to be made to cove the costs and expenses of said work or improvement. In the event tha said lots, pieces or parcels of land, or any of them, shall, by said resolutio be omitted from the assessment then the total expense of all work don shall be assessed on the remaining lots fronting on the work or improvemen or lying within the limits of the assessment district without regard to such omitted lots, pieces or parcels of land. In the event the city council shall, in its resolution of intention, declare that the said lots, pieces or parcels of land so owned and in use, or any of them, shall be included in the assessment, or in the event that no declaration is made respecting such lots, pieces or parcels of land, then such sum or sums as thereafter may be assessed against such lots, pieces or parcels of land, so owned and used, shall be payable by the city out of the general fund, unless the council shall in its resolution of intention designate another fund and the contract for said work or improvement thereafter made shall contain a provision to that effect.

Subdivision Nine.—It shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform, at his or their own expense (after obtaining permission from the council so to do, but before said council has passed its resolution of intention to order grading inclusive of this), any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon to procure, at his or their own expense, a certificate from the city engineer, setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter to file said certificate with the superintendent of streets, which certificate the superintendent shall record in a book kept for that purpose in his office, properly indexed. Whenever thereafter the city council orders the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contracts must express the price by the cubic yard for cutting and filling in grading; and the said owner or owners and his or their successors in interest, shall be entitled to credit, on the assessment upon his or their lots and lands fronting on said streets for the grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been duly altered, only for so much of said certified work as would be required for grading to the altered grade; provided, however, that such owner or owners shall not be entitled to such credit as may be in excess of the assessments for grading upon the lots and lands owned by him or them, and proportionately assessed for the whole of said grading; and the superintendent of streets shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the duly altered grade so much of said certified work as would be required for grading thereto, and shall enter

corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands owned, respectively, by said certified owners and their successors in interest; provided, however, that he shall not so include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners or their successors in interest. Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, (except grading) on such street, in front of any block, at his or their own expense, and the city council shall have subsequently ordered any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done; provided, that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time said order is passed.

Subdivision Ten.—Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city council shall direct the city engineer to make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the city council, the clerk shall, at the time of such approval, certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the superintendent of streets of said city, who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets or city council, on appeal, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section.

Subdivision Eleven.—The terms lot, lots, lands, piece or parcel of land wherever mentioned in this act shall be deemed to include and shall include property owned or controlled by any person, firm or corporation as a railroad, street, or interurban railroad, right of way, and whenever a railroad, street or interurban railroad right of way shall front or abut on any street improved under the provisions of this act or shall be included within any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessments, and diagram and shall be assessed in the same manner and with the same effect as other lots, lands or pieces or parcels of land are assessed as provided

in this act and such railroad right of way shall be subject to sale for non-payment of assessments as in this act provided.

Subdivision Twelve.—Whenever any railroad track or tracks of any description exist upon the street or streets upon which the city council of any city has ordered an improvement to be made, and has excepted therefrom the portions used by the track, between the rails and for two feet on each side thereof, and between the tracks if there be more than one, the said order, unless said city council shall by resolution theretofore passed have declared the contrary, shall be deemed to be and constitute a requirement that the person or company having said railroad track or tracks thereon shall improve the said portion with improvements similar in all respects to, with the same materials, under the same specifications and superintendence, and to the like satisfaction as those ordered to be performed by said order ordering the work, and the resolution of intention and notice of proposed improvement shall be construed and are hereby declared to be notice to said person or company of the intention to order the same. Thereupon it shall be the duty of said person or company having such track or tracks on such street or streets to notify in writing the superintendent of streets if such person or company elects to perform such work at its own charge and expense and under its own direction; said notice must be delivered to the superintendent of streets within ten days after the first publication of notice or award of contract. The omission or neglect to make such election shall be construed as constituting the superintendent of streets the agent of the owner of said track or tracks, with authority to enter into a contract made in accordance with the provisions of this section for making the said improvements. Said superintendent of streets shall advertise for bids for the improvement of said portions of street or streets lying between the rails and for two feet on each side thereof, and between the tracks, if there be more than one. It shall be the duty of said city council to award the contract for the making of said improvements to the lowest regular responsible bidder. Such bidding and awarding of contracts shall be made in the same manner hereinbefore provided for the awarding of contracts for improvements, excepting that no notice of award shall be published. Immediately upon the award, the superintendent of streets shall enter into a contract with the person to whom said contract was awarded for the making of said improvement or improvements upon the portions of the street or streets described in said notice inviting bids, and at the price stated in said bid. The contractor shall execute bonds in the manner required for the execution of contracts for improvements. Upon the completion of the work and its acceptance, the street superintendent shall make a certificate of such completion together with a statement of the amount due under the terms of said contract for the performance of said work. Such certificate shall be countersigned by the mayor of said city, and shall be recorded in the office of said superintendent of streets. The contractor shall thereupon be entitled to payment of the full amount of said contract price, and the recording of such certificate shall be sufficient notice to the owner of such track or tracks that said contract price is due and payable. In the event that such amount is not paid within thirty days from the date of the recording of said certificate, the contractor may file a sworn statement to that effect with the superintendent of streets, who shall record the same in his office in the book in which the certificate of acceptance has been recorded. Said contractor shall thereupon have a cause of action against said person or company owning said track or tracks for the amount of said contract,

together with a reasonable attorney's fee, and shall also have as security for the recovery of such amount, a first lien upon the track and franchises of said person or company, between whose rails or tracks the said work has been performed, contained within the corporate limits of the said city. In such suit, the certificate of the superintendent of streets, hereinbefore mentioned, shall be and constitute prima facie evidence of the regularity of all proceedings, and of the right of the contractor to recover judgment against said person or company. Execution may be taken out upon the entry of judgment, and levied upon any property of said person or company subject to execution. In the event that said person or company shall file the written election to perform such work at its own cost and expense and under its own direction, no further proceedings shall be taken in the matter unless such person or company neglects or fails for thirty days, or for such further time as the city council may grant, to make said improvement. In the event that the improvement of the portions of the street or streets above described, between the rails and for two feet on each side thereof, and between the tracks if there be more than one, shall not be made with diligence, or in all respects similar to the improvement of the rest of the street, or with the same materials or under the same specifications, and to the satisfaction of the superintendent of streets, the city council of said city may, by resolution entered in its minutes, prescribe such terms and conditions as to it may seem fit and proper before permitting the said person or company to continue with the said improvement. If the said person or company shall, after three days' notice of the adoption of said resolution, fail to comply with the terms and conditions so prescribed, the said city council may declare said person or company to have forfeited its privilege of performing such work under its own direction. Whereupon the street superintendent shall advertise for bids for the performance of such work, or such portions thereof as may remain uncompleted, and the contract therefor shall be awarded and entered into in the same manner hereinbefore provided for the awarding and execution of contracts where said person or company has not elected to make the improvement under its own direction; and upon the completion of the improvement, the contractor to whom such contract may be awarded, or his assigns, shall be entitled to a certificate from the street superintendent similar to that hereinbefore provided for, and shall have the right to collect from said person or company by suit the amount specified in such certificate in all respects the same as is hereinbefore provided where the contract is let for such improvement in the first instance.

Subdivision Thirteen.—The said council may include in one resolution of intention and order any of the different kinds of work mentioned in this act, and may include any number of streets and rights of way or portion thereof in one proceeding and one contract, and it may except therefrom any of said work already done upon the street to the official grade. The lots and portions of lots fronting upon said accepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; provided, that this shall not be construed so as to affect the special provisions as to grading contained in this act. [Amendment approved April 5, 1911.]

§ 8. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (includ-

of said bonds, and the day and hour of such sale, and shall cause such resolution to be entered in the minutes, and shall cause notice of such sale to be published for fifteen days in at least one newspaper published in the city in which the bonds are issued, and one published in the city and county of San Francisco, and in any other newspaper in the state, at their discretion. The notice shall state that sealed proposals will be received by the council for the purchase of the bonds on the day and hour named in the resolution. The council, at the time appointed, shall open the proposals and award the purchase of the bonds to the highest bidder, but may reject all bids.

§ 31. The council may sell said bonds, at not less than par value, without the notice provided for in the preceding section.

§ 32. The proceeds of the sale of the bonds shall be deposited in the city treasury, to the account of the sewer fund, but no payment therefrom shall be made, except to pay for the construction of the sewer or sewers, for the construction of which the bonds were issued, and upon the certificate of the superintendent of streets and the city engineer that the work has been done according to the contract; provided, that after the completion of the sewers, for the construction of which said bonds were issued, if there be any money of said fund left in the treasury, the same may be transferred to the general fund, for general purposes. [Amendment approved March 15, 1887. Stats. 1887, p. 148.]

§ 33. Whenever said council shall determine to construct any sewer, and pay therefor out of the street contingent fund, or by the issuance of bonds, as above provided, then said council shall cause to be prepared plans and specifications of said work in sections, and shall advertise for twenty days in at least one newspaper published in the city in which the sewer is to be constructed, and one in the city and county of San Francisco, for sealed proposals for constructing said sewer. The work may be let in sections, and must be awarded to the lowest responsible bidder, the council having the right to reject any and all bids. The work shall be done and the materials furnished under the supervision and to the satisfaction of the superintendent of streets and the city engineer.

Part III.

§ 34. First. The city engineer, or where there is no city engineer, the county, or city and county surveyor, shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services.

Second. The words "work," "improve," "improved" and "improvement," as used in this act, shall include all work mentioned in this act,

or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof made to or recorded by said superintendent of streets, any person interested therein may, at any time within three months after the entry of said final judgment, apply to said superintendent of streets who issued the same, or to any superintendent of streets in office at the time of said application, for another assessment to be issued in conformity to law; and said superintendent shall, within fifteen days after the date of said application, make and deliver to said applicant a new assessment, diagram, and warrant in accordance with law; and the acting mayor shall countersign the same as now provided by law, which assessment shall be a lien for the period of two years from the date of said assessment, and be enforced as provided in section 7 of this act. [Amendment approved March 31, 1891. Stats. 1891, p. 205.]

§ 10. The contractor, or his assigns, or some person in his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made the contractor, his assigns, or some person in his or their behalf, shall receipt the same upon the assessment in presence of the person making such payment, and shall also give a separate receipt if demanded. Whenever the person so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as "Unknown" on the assessment, then the said contractor, or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed. The warrant shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon, signed by the contractor, or his assigns, or some person in his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid, in whole or in part, and the amount thereof. Thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full length in a book to be kept for that purpose in his office, and shall sign the record. The said superintendent of streets is authorized at any time to receive the amount due upon any assessment-list and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued; and if any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed; provided, however, that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid.

§ 11. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any

work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council. Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be published for five days. Upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option. All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided; and no assessment shall be held invalid, except upon appeal to the city council, as provided in this section, for any error, informality, or other defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done, for which the assessment is made, has been actually published in any designated newspaper of said city for the length of time prescribed by law, before the passage of the resolution ordering the work to be done.

§ 12. At any time after the period of thirty-five days from the day of the date of the warrants, as herein provided, or if an appeal is taken to the city council, as provided in section 11 of this act, at any time after five days from the decision of said council, or after the return of the warrant or assessment, after the same may have been corrected, altered or modified, as provided in said section 11 (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. And in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said

action, and he may have judgment therefor. Suit may be brought in the superior court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners thereof cannot, with due diligence, be found, the service in each of such actions may be had in such manner as is prescribed in the codes and laws of this state. The said warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts; and on appeal, the appellate courts shall be vested with the same power to adjudge and decree a lien and to order such premises to be sold on execution or decree as is conferred on the court from which an appeal is taken. Such premises, if sold, may be redeemed as in other cases. In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict therewith, by the codes of this state. This act shall be liberally construed to effect the ends of justice. [Amendment approved March 14, 1889. Stats. 1889, p. 168.]

§ 12½. The city council, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as in sections 8, 9, 10, 11, and 12 of the act of which this is amendatory is provided. [New section approved March 14, 1889. Stats. 1889, p. 169.]

§ 13. When any portion of any street, alley, or public place in said city shall be out of repair or needing reconstruction, or in a condition to interfere with the public convenience in the use thereof, it shall be the duty of the superintendent of streets to notify the owner of any lot or portion of a lot, fronting on the portion of such street, alley, or public place, so out of repair or needing reconstruction, to repair or reconstruct such portion of said street, alley, or public place, to the center line of said street, alley, or public place, in front of the property of which he is the owner, or to repair the sidewalk in front of such property in case such sidewalk shall need repair or reconstruction, and he shall state in such notice what work is required to be done, and what materials shall be used in said work and how the same shall be done. If said repairs or reconstruction be not commenced within ten days after notice given, as aforesaid, and prosecuted to completion diligently, the said superintendent of streets may under authority from said city council let a contract for the performance of such work. He shall post notice at his office for two days inviting bids for the doing of said work of repair or reconstruction, and the contract shall be awarded by him to the lowest bidder, and a contract in writing shall be entered into with the successful bidder. Upon the completion of said repairs or reconstruction to the satisfaction of said superintendent of streets, he shall make and deliver to said con-

tractor a certificate to the effect that said repairs or reconstruction or both, have been properly made, and state what amount is payable by each owner for the same, which certificate shall be recorded in the office of said superintendent of streets in a book kept for that purpose, and all owners of property in front of which such improvement shall have been performed, shall be deemed to have notice of the contents of the record thereof. The contractor may make demand for the amount due by serving written notice upon the owners, referring to the certificate so recorded, and if the contractor be not paid on demand, he shall have the right to sue each owner for the amount due and payable from each respectively, and the said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for the work and materials and of the right of the contractor to recover for the same in such action, and the amount so due and payable shall be a first lien upon the respective lots, pieces or parcels of land against which it may be charged and shall have the same effect as the lien hereinbefore provided for in section nine of this act and may be enforced in the same manner.

In addition, the city council shall have power by ordinance to prescribe the penalties that shall be incurred by any owner for neglecting or refusing to make repairs when required, which penalties shall be recovered for the use of the city by prosecution in the name of the people of the state of California, in the court having jurisdiction thereof, and may be applied, if deemed expedient, by the said city council in the payment of the expense of any such repairs not otherwise provided for. [Amendment approved April 5, 1911.]

§ 14. If the expenses of the work and material for such improvements after the completion thereof, and the delivery to said contractor of said certificate, be not paid to the contractor so employed, or his agent or assignee, on demand, the said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant for the amount contracted to be paid; and said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the said superintendent of streets in a book kept by him in his office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien, the same as provided in section 9 of this act, and may be enforced in the same manner.

§ 15. In addition, and as cumulative to the remedies above given, the city council shall have power, by resolution or ordinance, to prescribe the penalties that shall be incurred by any owner or person liable, or neglecting, or refusing to make repairs when required, as provided in section (13) thirteen of this act, which fines and penalties shall be recovered for the use of the city by prosecution in the name of the people of the state of California, in the court having jurisdiction thereof, and may be applied, if deemed expedient by the said council, in the payment of the expenses of any such repairs not otherwise provided for.

§ 16. The person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as the executor, administrator, or guardian of the owner, shall be re-

garded, treated, and deemed to be the "owner" (for the purpose of this law), according to the intent and meaning of that word as used in this act. And in case of property leased, the possession of the tenant or lessee holding and occupying under such persons shall be deemed to be the possession of such owner.

§ 17. Any tenant or lessee of the lands or lots liable may pay the amount assessed against the property of which he is the tenant or lessee under the provisions of this act, or he may pay the price agreed on to be paid under the provision of section 13 of this act, either before or after suit brought, together with costs, to the contractor, or his assigns, or he may redeem the property, if sold on execution or decree for the benefit of the owner, within the time prescribed by law, and deduct the amount so paid from the rents due and to become due from him, and for any sums so paid beyond the rents due from him, he shall have a lien upon and may retain possession of the said land and lots until the amount so paid and advanced be satisfied, with legal interest, from accruing rents, or by payment by the owner.

§ 18. The records kept by the superintendent of streets of said city, in conformity with the provisions of this act, and signed by him, shall have the same force and effect as other public records, and copies therefrom, duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any citizen wishing to examine them, free of charge.

§ 19. Notices in writing which are required to be given by the superintendent of streets, under the provisions of this act, may be served by any person, with the permission of the superintendent of streets, and the fact of such service shall be verified by the oath of the person making it, taken before the superintendent of streets, who for that purpose, and for all other purposes, and in all cases where a verification is required under the provisions of this act, is hereby authorized to administer oaths, or other person authorized to administer oaths, or such notices may be delivered to the superintendent of streets himself, who must also verify the service thereof, and who shall keep a record of the fact of giving such notices, when delivered by himself personally, and also of the notices and proof of service when delivered by any other person. [Amendment approved March 14, 1889. Stats. 1889, p. 170.]

§ 20. [Repealed 1911.]

§ 21. The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. He shall superintend and direct the cleaning of all sewers, and the expense of the same shall be paid out of the street or sewer fund of said city.

§ 22. It shall be the duty of the superintendent of streets to see that the laws, ordinances, orders, and regulations relating to the public streets and highways be fully carried into execution, and that the penalties thereof are rigidly enforced. He shall keep himself informed of the condition of all the public streets and highways, and also of all public buildings, parks, lots, and grounds of said city, as may be prescribed by the city council. He shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties and for such sums as may be

required by the city council; and should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect.

§ 23. If, in consequence of any graded street or public highway improved under the provisions of this act, being out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using said street or public highway, and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city.

§ 24. The city council of such city shall have full power and authority to construct sewers, gutters, and manholes, and provide for the cleaning of the same, and culverts or cesspools, or cross-walks, or sidewalks, or any portion of any sidewalk, upon or in any street, avenue, lane, alley, court, or place in such city; and also for drainage purposes, over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same, of such materials, in such a manner, and upon such terms as it may be deemed proper. None of the work or improvements described in this section shall be stayed or prevented by any written or any other remonstrance or objection, unless such council deems proper. [Amendment approved March 11, 1893. Stats. 1893, p. 173.]

§ 25. The city council may, in its discretion, repair and water streets that shall have been graded, curbed, and planked, paved, or macadamized, and may build, repair, and clean sewers, and shall provide a street contingent fund at the same time and in the same manner as other funds are provided, out of which to pay the costs and expenses of making said repairs, and watering said streets, and building, repairing, and cleaning said sewers; but whenever any unaccepted street or part of a street requires regrading, recurbing, repiling, repaving, replanking, regraveling, or remacadamizing, or requires new culverts, or new crosswalks, or new sidewalks, or new sewers, the work shall be advertised and let out by contract, and the costs and expenses thereof shall be assessed upon the property affected or benefited thereby, the same as in the first instance.

§ 26. The city council may, in its discretion, order, by resolution, that the whole or any part of the cost and expenses of any of the work mentioned in this act be paid out of the treasury of the municipality from such fund as the council may designate. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, in making up the assessment heretofore provided for such cost and

expenses, shall first deduct from the whole cost and expenses such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expenses proportionately upon the lots, parts of lots, and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided. [Amendment approved March 31, 1891. Stats. 1891, p. 206.]

Part II.

§ 27. Whenever the city council deem it necessary to construct a sewer, then the said council may, in its discretion, determine to construct said sewer, and assess the cost and expenses thereof upon the property to be affected or benefited thereby, in such manner and within such assessment district as it shall prescribe, and the lien therefor upon said property shall be the same as is provided in section 9 of this act, or said council may determine to construct said sewer and pay therefor out of the street contingent fund.

§ 28. If, at any time, the city council shall deem it necessary to incur any indebtedness for the construction of sewers, in excess of the money in the street contingent fund applicable to the construction of such sewers, they shall give notice of a special election by the qualified electors of the city, to be held to determine whether such indebtedness shall be incurred. Such notice shall specify the amount of indebtedness proposed to be incurred, the route and general character of the sewer, or sewers to be constructed, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund as hereinafter provided. Such notice shall be published for at least three weeks in some newspaper published in such city, and no other question or matter shall be submitted to the electors at such election. If, upon a canvass of the votes cast at such election, it appear that not less than two-thirds of all the qualified electors voting at such election shall have voted in favor of incurring such indebtedness, it shall be the duty of the city council to pass an ordinance providing for the mode of creating such indebtedness, and of paying the same; and in such ordinance provision shall be made for the levy and collection of an annual tax upon all the real and personal property subject to taxation, within such city, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within a period of not more than twenty years from the time of contracting the same. It shall be the duty of the city council in each year thereafter, at the time when other taxes are levied, to levy a tax sufficient for such purpose, in addition to the taxes authorized to be levied for city purposes. Such tax, when collected, shall be kept in the treasury as a separate fund, to be inviolably appropriated to the payment of the principal and interest of such indebtedness.

§ 29. If bonds are issued under the provisions of the last section, said bonds shall be in sums of not less than one hundred dollars nor more than one thousand dollars, shall be signed by the mayor and treasurer of the city, and the seal of the city shall be affixed thereto. Coupons for the interest shall be attached to each bond, signed by the mayor and treasurer. Said bonds shall bear interest, to be fixed by the city council, at the rate of not to exceed five per cent per annum.

§ 30. Before the sale of said bonds, the council shall, at a regular meeting, by resolution, declare its intention to sell a specified amount

of said bonds, and the day and hour of such sale, and shall cause such resolution to be entered in the minutes, and shall cause notice of such sale to be published for fifteen days in at least one newspaper published in the city in which the bonds are issued, and one published in the city and county of San Francisco, and in any other newspaper in the state, at their discretion. The notice shall state that sealed proposals will be received by the council for the purchase of the bonds on the day and hour named in the resolution. The council, at the time appointed, shall open the proposals and award the purchase of the bonds to the highest bidder, but may reject all bids.

§ 31. The council may sell said bonds, at not less than par value, without the notice provided for in the preceding section.

§ 32. The proceeds of the sale of the bonds shall be deposited in the city treasury, to the account of the sewer fund, but no payment therefrom shall be made, except to pay for the construction of the sewer or sewers, for the construction of which the bonds were issued, and upon the certificate of the superintendent of streets and the city engineer that the work has been done according to the contract; provided, that after the completion of the sewers, for the construction of which said bonds were issued, if there be any money of said fund left in the treasury, the same may be transferred to the general fund, for general purposes. [Amendment approved March 15, 1887. Stats. 1887, p. 148.]

§ 33. Whenever said council shall determine to construct any sewer, and pay therefor out of the street contingent fund, or by the issuance of bonds, as above provided, then said council shall cause to be prepared plans and specifications of said work in sections, and shall advertise for twenty days in at least one newspaper published in the city in which the sewer is to be constructed, and one in the city and county of San Francisco, for sealed proposals for constructing said sewer. The work may be let in sections, and must be awarded to the lowest responsible bidder, the council having the right to reject any and all bids. The work shall be done and the materials furnished under the supervision and to the satisfaction of the superintendent of streets and the city engineer.

Part III.

§ 34. First. The city engineer, or where there is no city engineer, the county, or city and county surveyor, shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services.

Second. The words "work," "improve," "improved" and "improvement," as used in this act, shall include all work mentioned in this act,

and also the construction, reconstruction and repairs of all or any portion of said work.

Third. The term "incidental expenses," as used in this act, shall include the compensation of the city engineer for work done by him; also the cost of printing and advertising, as provided in this act, and not otherwise; also the compensation of the person appointed by the superintendent of streets to take charge of and superintend any of the work mentioned in section 35 of this act; also the expenses of making the assessment for any work authorized by this act. All demands for incidental expenses mentioned in this subdivision shall be presented to the street superintendent by itemized bill, duly verified by oath of the demandant.

Fourth. The notices, resolutions, orders or other matter required to be published by the provisions of this act, and of the act of which this is amendatory, shall be published in a daily newspaper, in cities where such there is, and where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council of such city, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that only in case there is no daily, semi-weekly or weekly newspaper printed or circulated in any such city, then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such city. Proof of the publication or posting of any notice provided for herein shall be made by affidavit of the owner, publisher or clerk of the newspaper, or of the poster of the notice. No publication or notice, other than that provided for in this act, shall be necessary to give validity to any of the proceedings provided for therein.

Fifth. The word "municipality" and the word "city," as used in this act, shall be understood and so construed as to include, and is hereby declared to include, all corporations heretofore organized and now existing, and those hereafter organized, for municipal purposes.

Sixth. The words "paved" or "repaved," as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance adopt.

Seventh. The word "street," as used in this act, shall be deemed to, and is hereby declared to, include avenues, highways, lanes, alleys, crossings, or intersections, courts and places, and the term "main street" means such actually opened street or streets as bound a block; the word "blocks," whether regular or irregular, shall mean such blocks as are bounded by main streets, or partially by a boundary line of the city.

Eighth. The terms "street superintendent" and "superintendent of streets," as used in this act, shall be understood and so construed as to include, and are hereby declared to include, any person or officer whose duty it is, under the law, to have the care or charge of the streets, or the improvement thereof in any city. In all those cities where there is no street superintendent or superintendent of streets, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of street superintendent or superintendent of streets; and all provisions hereof applicable to the

street superintendent or superintendent of streets shall apply to such person so appointed.

Ninth. The term "city council" is hereby declared to include any body or board which, under the law, is the legislative department of the government of any city.

Tenth. In municipalities in which there is no mayor, then the duties imposed upon said officer by the provisions of this act shall be performed by the president of the board of trustees, or other chief executive officer of the municipality.

Eleventh. The term "clerk" and "city clerk," as used in this act, is hereby declared to include any person or officer who shall be clerk of the said city council.

Twelfth. The term "quarter block," as used in this act as to irregular blocks, shall be deemed to include all lots or portions of lots having any frontage on either intersecting street half way from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city.

Thirteenth. The term "one year," as used in this act, shall be deemed to include the time beginning with January first and ending with the thirty-first day of December of the same year.

Fourteenth. References in certain sections, by number, to certain other sections of "this act" refer to the number of the sections of the original act, as heretofore amended, unless it appears from the context that the reference is to the section of this amendatory act, when it shall be construed according to the context. [Amendment approved March 23, 1907. Stats. 1907, p. 1000. In effect immediately.]

§ 35. The superintendent of streets shall, when in his judgment it is necessary, appoint a suitable person to take charge of and superintend the construction and improvement of each and every sewer constructed or improved under the provisions of this act, and of piling and capping sidewalks, or of the paving of whatever character heretofore mentioned, in whole or in part, of one block or more, whose duty it shall be to see that the contract made for the doing of said work is strictly fulfilled in every respect, and in case of any departure therefrom to report the same to the superintendent of streets. Such person shall be allowed for his time actually employed in the discharge of his duties such compensation as shall be just, but not to exceed five dollars per day. The sum to which the party so employed shall be entitled shall be deemed to be incidental expenses, within the meaning of those words as defined by this act. [Amendment approved April 5, 1911.]

§ 36. The act entitled "An act to provide for the improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities," approved March sixth, eighteen hundred and eighty-three, is hereby repealed; provided, that any work or proceedings commenced thereunder prior to the passage of this act shall in nowise be affected hereby, but shall in all respects be finished and completed under said act of March sixth, eighteen hundred and eighty-three, and said repeal shall in nowise affect said work or proceedings.

§ 37. That said act shall take effect and be in force immediately upon its passage, and all acts and parts of acts in conflict with this act are hereby repealed; and provided, however, that any work or proceeding of the city

council commenced under the act of which this is amendatory shall in nowise be affected thereby, but shall in all respects be finished and completed thereunder. [Amendment approved March 11, 1893. Stats. 1893, p. 173.]

§ 38. The city council is hereby empowered to change or modify the grade of any public street, lane, alley, place, or court, and to regrade or repave the same, so as to conform to such modified grade, in the manner as hereinafter provided. Before any change of grade is ordered the city council shall pass an ordinance or resolution of intention to make such change or modification of grade, and it shall have power at the same time and in the same ordinance or resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, or curbing of said street or portion of street, with the same or other material with which it was formerly graded, paved, sewered, sidewalked, or curbed; and that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such changed or modified grade. One or more streets or blocks of streets may be embraced in the same ordinance or resolution. Such ordinance or resolution shall be published in the newspaper in which the official notices of the city council are usually printed and published; and such newspaper is to be designated in such ordinance or resolution. Such publication shall be made in every regular issue of such paper for not less than ten days, and shall describe the proposed change or modification of grade or regrading, and shall designate and establish the district to be benefited by such change or modification of grade or regrading, and to be assessed for the cost of the same. Within five days after the first publication of the ordinance or resolution of intention, the superintendent of streets shall cause to be conspicuously posted within the district designated in the ordinance of resolution, notice of the passage of said resolution. Said notices shall be the same in all requirements of contents and posting as the "Notices of Street Work" provided for in section 3 of the original act to which this is amendatory. If no objection to said proposed change or changes, or modifications of grade, shall be filed with the clerk of the council within thirty days from the first publication of the ordinance or resolution of intention hereinbefore mentioned, the city council shall have power to declare such grades to be changed and established in conformity to said ordinance or resolution; provided, that no change of an established grade shall be ordered except on petition of the owners of a majority of the property affected by the proposed change of grade. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 89.]

§ 39. Within thirty days after the first publication of said notice, any person owning property fronting upon said portions of the street or streets where such change of grade is made, may file a petition with the clerk of the city council showing the fact of such ownership, the description and situation of the property claimed to be damaged, its market value, and the estimated amount of damages over and above all benefits which the property would sustain by the proposed change if completed. Such petition shall be verified by the oath of the petitioners or their agents. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.]

§ 40. Whenever such petition or petitions have been filed, the mayor, surveyor, and superintendent of streets of the city, or city and county, acting as a board of commissioners, shall assess the benefits, damages, and costs of the proposed change of grade upon each separate lot of land situated

within such assessment district, as said lot appears of record upon the last city, or city and county assessment-roll. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.]

§ 41. The commissioners shall be sworn to make the assessments of benefits and damages to the best of their judgment and ability, without fear or favor. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.]

§ 42. The commissioners shall have power to subpoena witnesses to appear before them to be examined under oath, which any one of said commissioners is authorized to administer. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.].

§ 43. The commissioners having determined the damage which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges, and expenses of the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvement; and during the progress of their work shall make a report to such city council as often as it may be required. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.]

§ 44. The commissioners shall make their report, in writing, and shall subscribe to the same and file with the city council. In their said report they shall describe separately each piece of property which will sustain damage, stating the amount of damages each will sustain over and above all benefits. They shall also give a brief description of each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of damages assessed against the same. In case the three commissioners do not agree, the award agreed upon by any two of them shall be sufficient. In designating the lots to be assessed, reference may be had to a diagram of the property in the district affected; such diagram to be attached to and made a part of the report of the commissioners. [En. 1891, p. 116. Rep. 1893, p. 33; amended 1893, p. 90.]

§ 45. If in any case the commissioners find that conflicting claims of title exist, or shall be in ignorance or doubt of the ownership of any lot or land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any land or improvements, or particulars of their interest, shall not affect the validity of the assessment. On the filing of said report, the clerk of said city council shall give notice of such filing by the publication of at least ten days in one or more daily newspapers published and circulated in said city; or if there be no daily newspaper, by three successive issues in a weekly or semi-weekly newspaper so published and circulated; and said notice shall require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on a day to be fixed by the city council and stated in said notice, which day shall not be less than twenty days from the first publication thereof. [Amendment approved March 9, 1893. Stats. 1893, p. 91.]

§ 46. All objections shall be in writing and filed with the clerk of the city council, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the council, which shall fix a time for hearing the same; of which time the clerk shall notify the

objectors in the same manner as are notified objectors to the original resolution of intention. At the time set, or at such other time as the hearing may be adjourned, the city council shall hear such objections and pass upon the same, and at such time shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given and had, as in the case of an original report. In case the ordinance or resolution of intention also provides for the assessing upon the district the cost of regrading or repaving such street or streets to such changed or modified grade, after the report of the commissioners as to the damages caused by such change of grade has been passed upon by the city council, it shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking, or curbing such street or streets with the same or other material with which the same had been formerly graded, paved, sewered, sidewalked, or curbed; first causing a notice, with specifications, to be posted conspicuously for five days on or near the council chamber door, inviting sealed proposals for bids for doing such work, and shall also cause notices of said work, inviting said proposals and referring to the specifications posted or on file, to be published two days in a daily, semi-weekly, or weekly newspaper published and circulated in said city, and designated by the city council for that purpose, and in case there is no newspaper published in the city, then it shall be posted as provided in section 3 of the original act to which this is amendatory. All proposals or bids offered shall be accompanied by a check, payable to the order of the mayor of the city, and certified by a responsible bank for that amount, which shall not be less than ten per cent of the aggregate of the proposals; or by a bond for said amount, signed by the bidder and two sureties, who shall justify under oath in double said amount over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall in open session, examine and publicly declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by a check or a bond satisfactory to the council. The city council may reject any and all bids, and may award the contract to the lowest responsible bidder, which award shall be approved by the mayor or the three-fourths vote of the city council. If not approved by the mayor or the three-fourths vote of the city council, the city council may re-advertise for proposals or bids for the performance of the work, as in the first instance, and thereafter proceed in the manner in this section provided. All checks accompanying bids shall be held by the clerk until the bearer has entered into a contract, as herein provided; and in case he refuses so to do, then the amount of his certified check shall be declared forfeited to the city, and shall be collected and paid into its general fund, and all bonds so forfeited shall be prosecuted, and the amount thereon collected paid into such fund. Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore provided for the posting of proposals for said work. [Amendment approved March 9, 1893. Stats. 1893, p. 91.]

§ 47. After such contract has been awarded and entered into, the clerk of the city council shall certify to the city council that fact, together with the total amount of the cost of the same, whereupon the city council shall cause to be forwarded to the commissioners a copy of such certificate; whereupon such commissioners shall proceed to assess the cost of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the

Provided, that in case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is provided in said street work act.

Provided, also, that if any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land, present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records, that he is such owner of record, and with such affidavit and certificate, such person notifies said treasurer, in writing, that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection, as if said lot or parcel of land had not been so listed by the street superintendent.

The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work.

They shall have annual coupons attached thereto, payable in annual order, on the second day of January in each year after the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, the first of which shall be payable upon the second day of January or July, as the case may be, next after its date, and shall be for the interest accrued at that time, and the last of which shall be for the amount of interest accruing from the second day of January or July, as the case may be, next preceding the maturity of said bonds to the maturity thereof. The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid and said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon shall be fully paid. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent, to the city treasurer, and of the validity of said lien, up to the date of said list. [Amended 1911. Stats. 1911.]

§ 5. Whenever, through the default of the owner of any lot or parcel of land to represent the assessment upon which such bond has been, or may hereafter be, issued, any payment, either upon the principal, or of the interest, has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond thereupon demands, in writing, that the said city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent.

Subdivision a. Upon the application of the holder of any bond that is now or shall hereafter become delinquent as provided in this section, the said city treasurer shall publish for two weeks in a newspaper of

of the property affected thereby, shall be published daily for five days, in one or more daily newspapers published and circulated in such city, or by at least two insertions in a weekly newspaper so published and circulated before the day of sale for such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment-list, and the place must be in or in front of the office of said superintendent of streets. All property sold shall be subject to redemption for one year, and in the same manner as in sales for delinquent state and county taxes; and the superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale a deed conveying the property sold, and may collect for each certificate fifty cents, and for each deed one dollar. All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes, in force at any given time, shall also then, as far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds. The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee. The superintendent of streets shall from time to time pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating each fund by the name of the street, square, lane, alley, court, or place for the change of grade for which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners or a majority of them. [Amendment approved March 9, 1893. Stats. 1893, p. 93.]

§ 50. When sufficient money is in the hands of the city treasurer, in the fund voted for the proposed work of improvement, to pay the total cost for damages, as well as for the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which can be received at the office of such commissioners. Such notification may be made by depositing a notice, postage paid, in the postoffice, addressed to his last known place of residence. If, after the expiration of three days after the service or deposit of the notice in the postoffice, he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer, to be delivered to him upon demand. [Amendment approved March 9, 1893. Stats. 1893, p. 94.]

§ 51. If the owner of any premises damaged neglects or refuses, for ten days after the warrant has been placed in the hands of the city treasurer, subject to his demand, to accept the same, the city council may cause proceedings to be commenced, in the name of the city, to condemn said premises, as provided by law under the right of eminent domain. The ordinance or resolution of intention shall be conclusive evidence of the necessity of the same. Such proceedings shall have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of the special fund in the treasury for that purpose. At any time after the trial and judgment entered, or pending appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum

from said fund to answer the judgment, and thereupon may authorize or order the municipality to proceed with the proposed work or improvements. In case of a deficiency in said fund to pay the whole assessed judgment and damages, the city council may, in its discretion, order the balance thereof to be paid out of the general fund of the treasury, or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last named case, in order to avoid delay, the city council may advance such balance out of any available fund in the treasury, and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation; provided, that warrants for damages and for costs of performing the work shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money remains in the fund to pay all warrants of the first class before paying any of the second. The provisions of section 1251 of the Code of Civil Procedure, requiring the payment of damages within thirty days after the entry of judgment, shall not apply to damages rendered in proceedings under this act. [Amendment approved March 9, 1893. Stats. 1893, p. 95.]

§ 52. All other provisions contained in the act to which this is amendatory, and which provisions are not in conflict herewith, shall apply to all matters herein contained. All proceedings in any work or improvement, such as is provided for in this act, already commenced and now in progress under another act now in force, or by virtue of an ordinance or resolution of intention heretofore passed, may, from any stage of such proceedings already commenced and now in progress, be continued under this act by resolution of the city council. The said work or improvement may then be conducted under the provisions of this act, with full force and effect in all respects from the stage of such proceedings at and from which such resolution or ordinance shall declare the intention to have such work done or improvement cease under such other acts or ordinances and continued under this act; and from such election so made all proceedings theretofore had are hereby ratified, confirmed, and made valid, and it shall be unnecessary to renew or conduct over again any proceedings prior to the passage of this act. [Amendment approved March 9, 1893. Stats. 1893, p. 95.]

§ 53. This act shall be liberally construed to the end that its purposes may be effected. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any proceeding taken hereunder which does not directly affect the jurisdiction of the city council to order the work or improvement shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided. [Amendment approved April 5, 1911.]

§ 54. Whenever in proceedings hereunder the time and place for hearing by the city council is fixed and from any cause the hearing is not then and there held or regularly adjourned to a time and place fixed, the power of the city council in the premises shall not thereby be divested or lost. The city council may fix a time and place for the hearing and cause notice thereof to be given by publication by at least one insertion in a daily, semi-weekly or weekly newspaper published and circulated in said city and designated by the council for that purpose such publication to be at least five days before the date of the hearing, and thereupon the city council shall

have power to act as in the first instance. [Amendment approved April 5, 1911.]

§ 55. In all resolutions, notices, orders and determinations subsequent to the resolution of intention and notice of street work a description of the work or the assessment district by reference to the resolution of intention therefor shall be sufficient. [Amendment approved April 5, 1911.]

§ 56. When the work prescribed by the resolution of intention is exclusively sidewalk or curbing work with or without such grading as is incidentally necessary to the doing of such sidewalk or curbing work, and no proposals or bids for doing the work are delivered to the clerk, as invited by the notice inviting the same, as provided for in section 5 of this act, the city council may, in its discretion, by a vote of three-fourths of its members in the affirmative, direct that a proposal or bid in the name and on the part of the city be filed, whereupon the contract for doing the work shall be awarded to the city, and the city shall thus be and become the "contractor" within the meaning of this act. And when the time has expired within which, as provided in said section 5 of this act the owners may elect to take the contract, shall have expired, and such owners have not so elected, the city shall be deemed to have undertaken to do and complete the work, at the price named, in such bid or proposal, within ninety days after the time when as aforesaid it is to be deemed to have undertaken the same, and to begin such work within fifteen days after said time. The city need not enter into a contract with the superintendent of streets, as provided in section 6 of this act, nor give any check or bond either upon bidding or to secure the performance of the work or payment for labor or materials. The warrant provided for in section 9 of this act shall be delivered to the clerk of the city council, and such clerk is hereby authorized to make on the part of the city the demand provided for in section 10 of this act. Except as in this section expressly provided otherwise, all and singular the provisions of this act shall apply in the case where the city, under the provisions of this section, becomes the contractor, that is to say, undertakes to do the work. And all the rights, dues and remedies of the "contractor," under the provisions of this act, shall accrue to the city in its character of one undertaking to do the work, as provided in this section. [New section approved March 18, 1909. Stats. 1909, p. 399. In effect immediately.]

2. The Bond Act.

An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds.

[Approved February 27, 1893. Stats. 1893, p. 33.]

Amended 1899, p. 40; 1911.

§ 1. Wherever in this act the phrase "street work act" is used, it means, and shall be taken to mean, the act entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for construction of sewers within municipalities," approved March eighteenth, eighteen hundred and eighty-five, and all acts amendatory thereof or supplementary thereto; and wherever in this act the name of any municipal body or officer is used, or any word or phrase is used which

of said railroad lying within the corporate limits of the city or town, on any part of which said work has been performed. Said street superintendent shall also keep a record of such bonds, as required by section 18 of the "Street Work Act." Whenever bonds have been issued, as herein provided, the same, together with the cost of such work and the interest thereon, shall be, except state, county, or municipal taxes, a first lien upon all the tracks, roadbed, switches, and franchises of said railroad within the corporate limits of the city or town, on any part of which said work has been performed. Sections 4 and 5 of this act, regarding the form, issuance, and foreclosure of street bonds, and the sale of property described therein, shall apply hereto, except that the work required to be performed by the treasurer by said sections shall be performed by the street superintendent, in so far as the bonds for the paving of railroads are concerned. None of the provisions of the "Street Work Act" in regard to a protest against the work shall apply to any work contemplated by this section. All provisions of the "Street Work Act" not inconsistent with the provisions hereof shall apply hereto.

§ 7. The term "city treasurer," as used in this act, shall be held to mean and include any person who, under whatever name or title, is the custodian of the funds of the municipality.

§ 8. The act entitled "An act to amend an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for construction of sewers within municipalities,' approved March eighteenth, eighteen hundred and eighty-five, by adding thereto an additional part, numbered 4, consisting of sections 38, 39, 40, 41, 42, 43, and 44, relative to a system of street improvement bonds," approved March seventeen, eighteen hundred and ninety-one, is hereby repealed, except as to any and all proceedings hitherto commenced thereunder, which proceedings may be completed, and have full force as is therein provided.

§ 9. This act shall take effect and become of force from and after its passage.

3. Improvement Act of 1911.

An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities, and for establishing and changing the grades of any such streets, avenues, lanes, alleys, courts, places and sidewalks, and providing for the issuance and payment of street improvement bonds to represent certain assessments for the cost thereof and providing a method for the payment of such bonds.

Part I.

Public Streets Defined.

§ 1. All streets, lanes, alleys, places or courts, in the municipalities of this state now open or dedicated, or which may hereafter be open or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purpose of this act, and the city council of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in this act under the proceedings hereinafter described.

the official map of said municipality, or upon any map on file in the office of the county recorder of the county in which said municipality is situated, then it shall be in said bond a sufficient description of said lot or parcel of land to designate it by said number or block, or both, as it appears on said official or recorded map.

Said bond shall be substantially in the following form:

Street Improvement Bond.

Series (designating it), in the city (or other form of the municipality) of (naming it).

$ —— No. ——

Under and by virtue of an act of the legislature of the state of California (title of said act), I, out of the fund for the above designated street improvement bonds, series ——, will pay to ——, or order, the sum of —— ($——), with interest at the rate of —— per cent per annum, all as is hereinafter specified, and at the office of the ——, treasurer of the —— of ——, state of California. This bond is issued to represent the cost of certain street work upon ——, in the —— of ——, as the same is more fully described in assessment number ——, issued by the street superintendent of said ——, after acceptance of said work, and recorded in his office. Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and in the diagram attached thereto, as number ——, and which now remains unpaid, but until paid, with accrued interest, is a first lien upon the property affected thereby, as the same is described herein, and in said recorded assessment with its diagram, to wit: the lot or parcel of land in said —— of ——, county of ——, state of California, ——.

This bond is payable exclusively from said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise for its principal or interest. The term of this bond is —— years from its date, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the second day of January of each year after its date an even annual proportion of its whole amount is due and payable, upon presentation of the coupon therefor, until the whole is paid, with all accrued interest at the rate of —— per centum per annum. The interest is payable semi-annually, to wit: on the second days of January and of July in each year hereafter, upon presentation of the coupons therefor, the first of which is for the interest from date to the next second day of ——, and thereafter the interest coupons are for semi-annual interest, except the last, which is for interest from the semi-annual payment next preceding and to the date of the final maturity of this bond. Should default be made in the annual payment upon the principal, or in any payment of interest, from the owner of said lot or parcel of land, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have said lot or parcel of land advertised and sold forthwith, in the manner provided by law.

At said —— of ——, this —— day of ——, in the year one thousand —— hundred and ——.

——,

City treasurer of the —— of ——.

Provided, that in case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is provided in said street work act.

Provided, also, that if any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land, present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records, that he is such owner of record, and with such affidavit and certificate, such person notifies said treasurer, in writing, that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection, as if said lot or parcel of land had not been so listed by the street superintendent.

The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work.

They shall have annual coupons attached thereto, payable in annual order, on the second day of January in each year after the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, the first of which shall be payable upon the second day of January or July, as the case may be, next after its date, and shall be for the interest accrued at that time, and the last of which shall be for the amount of interest accruing from the second day of January or July, as the case may be, next preceding the maturity of said bonds to the maturity thereof. The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid and said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon shall be fully paid. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent, to the city treasurer, and of the validity of said lien, up to the date of said list. [Amended 1911. Stats. 1911.]

§ 5. Whenever, through the default of the owner of any lot or parcel of land to represent the assessment upon which such bond has been, or may hereafter be, issued, any payment, either upon the principal, or of the interest, has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond thereupon demands, in writing, that the said city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent.

Subdivision a. Upon the application of the holder of any bond that is now or shall hereafter become delinquent as provided in this section, the said city treasurer shall publish for two weeks in a newspaper of

general circulation, to be designated by him, published in the city where his office is situated, a notice which must contain the date, number, and series of the delinquent bond, a description of the property mentioned in said bond, and the name of the owner of such property (if known), and if unknown, the fact shall be so stated, the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the cost of publication of such notice are paid, the real property described in said bond will be sold at public auction on a day to be therein fixed, which shall not be less than fifteen nor more than thirty days from the day of the first publication of said notice, and the place of such sale, which must be the office of the said city treasurer.

Subdivision b. The city treasurer, before the day of sale hereinafter provided for, must file with the city clerk a copy of the publication, with an affidavit of the publisher of such newspaper, or some one in his behalf, attached thereto, that it is a true copy of the same; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication was made—which affidavit is primary evidence of all the facts stated therein.

Subdivision c. The city treasurer must collect, in addition to the amount due on such bond, the cost of the publication of such notice, and fifty cents for the certificate of sale, as hereinafter provided.

Subdivision d. At any time prior to the sale, the owner or person in possession of any real estate offered for sale under the provisions of this act may pay the whole amount of said bond then due, with costs, and such bond shall thereupon be canceled; but in case such payment is not made by such owner, or person in possession, or by some one in behalf of such owner, or person in possession, the property subject thereto shall be sold as herein provided.

Subdivision f. The city treasurer, before delivering any certificate, must, in a book kept in his office for that purpose, enter the date, number, and series of the bond, a description of the land sold corresponding with the description of the certificate, the date of sale, purchaser's name, the amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection during office hours when not in actual use, and he shall enter on the record of the bond the words "Canceled by sale of the property," giving the date of such sale.

Subdivision g. Immediately on the sale, the purchaser shall become vested with a lien on the property, so sold to him, to the extent of his bid, and is only divested of such lien by the payment to the city treasurer of the purchase money, including costs herein provided for, with interest thereon at the rate of one per cent per month from the date of sale.

Subdivision h. A redemption of the property sold may be made by the owner of the property, or any party in interest, within twelve months from the date of purchase, or at any time prior to the application for a deed, as hereinafter provided. Redemption must be made in lawful money of the United States, and when made to the city treasurer he must credit the amount paid to the person named in his certificate, and pay it on demand to him or his assignees.

Subdivision i. On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the

city treasurer, the fee for which shall be fifty cents, and on presentation of the receipt of the city treasurer for the total amount of the redemption money, the recorder must, without charge, mark the word "Redeemed," the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made.

Subdivision j. If the property is not redeemed within the time allowed by subdivision h hereof for its redemption, the city treasurer, or his successor in office, upon application of the purchaser or his assignee, must make to said purchaser, or his assignee, a deed to the property, reciting in the deed, substantially, the matter contained in the certificate, and that no person has redeemed the property during the time allowed for its redemption; the treasurer shall be entitled to receive from the purchaser two dollars for making said deed, which shall be deposited in the city treasury for the use of the city after payment has been made therefrom for the acknowledgment of said deed; provided, however, that the purchaser of the property, or his assignee must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties, and costs in this act required. In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; and no deed to the property sold, in accordance with the provisions of this act, shall be issued by the city treasurer to the purchaser of such property, until such purchaser shall have filed with such treasurer an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the said treasurer as other records kept by him in his office. Such purchaser shall be entitled to receive the sum of fifty cents for his service of such notice and the making of said affidavit, which sum of fifty cents shall be paid by redemptioner at the time and in the same manner as the other sums, costs, and fees are paid.

Subdivision k. The deed, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption free of all encumbrances, except the lien for state, county, and municipal taxes. [Amended March 2, 1899. Stats. 1899, p. 43.]

§ 6. Whenever any railroad track or tracks of any description exist upon any street or streets on which the city council has ordered work to be done or improvements made, excepting therefrom such portions as is [are] required by law to be kept in order or repair, by any person or company having railroad tracks thereon, the said council may, at any time thereafter, order such person or company to perform upon said excepted portion the work or improvements, similar in all respects to that already ordered to be performed under the same specifications and super-

intendence, with the same materials, within the same time, and to the like satisfaction and acceptance. Thereupon it shall be the duty of the clerk of said council to deliver immediately a copy of such order, certified by him, to such person or company, and to make and preserve in his office a certificate of such delivery, its date, and upon whom made. Should such person or company, for thirty days, or within such extension of time as the city council may grant, thereafter refuse or neglect to make or have made such work or improvement in the manner or time ordered, it shall be the duty of the city council to have such work or improvement performed, and such refusal or neglect punished in the manner provided by law. Within fifteen days after receiving the certified copy of said order, such person or company may file with the clerk of said council a written assumption of the performance of said work or improvement, according to the order, or a request to the council to have such work or improvement performed, for and at the expense of such person or company, in the manner herein provided. The failure to file such instrument within said time shall be taken and deemed to be a refusal to comply with the order. Upon reception of said assumption of the direct performance of said work or improvement, the city council shall take no further proceedings in the matter, unless such person or company neglects or fails for thirty days, or such further time as the council may grant, to comply with the provisions of the order. But if such person or company files the said request that the said council have such work or improvement performed, or fails to perform said work within thirty days, or within such further time as the council may grant, then said city council may pass an ordinance of intention to perform said work, which ordinance shall specify the work to be performed, and a statement that unless within thirty days after the recording of the return of the warrant, or within five days after the final decision of the council on an appeal, the said person or company shall pay the cost of said work, or the street superintendent of said city shall issue bonds to represent the cost of said work, stating also that the cost of said work, in case bonds shall issue, shall be paid in ten yearly installments, and also the rate of interest (not to exceed ten per cent per annum) that the same shall bear. The subsequent procedure shall be as provided by the "Street Work Act." A similar statement shall also be incorporated in all notices required to be posted or published by the provisions of the "Street Work Act"; also in the ordinance or resolution ordering the work, advertisement for proposals, and in the contract. Whenever the person or company owning any such railroad shall not have, within thirty days after the recording of the return of the warrant, or within five days after the final decision of the council on an appeal, paid the cost of such work, the street superintendent shall issue to the contractor, or his assigns, bonds for the amount of such cost, which shall describe the franchise, tracks, and roadbed along or between which said work has been performed, and describing the same as upon the assessment and diagram, giving its assessment number. Such bonds shall also describe the work performed, giving the total amount of the cost of such work, the name of the owner of said railroad, the number of installments in which the cost of the work is to be paid, and the rate of interest which the deferred payments shall bear. Said bonds shall be in sums of not less than one hundred dollars or more than one thousand dollars, and shall recite that the total amount of the cost of such work, together with the interest thereon, as represented in said bonds, is, except state, county, and municipal taxes, a first lien upon all the track, roadbed, switches, and franchises

of said railroad lying within the corporate limits of the city or town, on any part of which said work has been performed. Said street superintendent shall also keep a record of such bonds, as required by section 18 of the "Street Work Act." Whenever bonds have been issued, as herein provided, the same, together with the cost of such work and the interest thereon, shall be, except state, county, or municipal taxes, a first lien upon all the tracks, roadbed, switches, and franchises of said railroad within the corporate limits of the city or town, on any part of which said work has been performed. Sections 4 and 5 of this act, regarding the form, issuance, and foreclosure of street bonds, and the sale of property described therein, shall apply hereto, except that the work required to be performed by the treasurer by said sections shall be performed by the street superintendent, in so far as the bonds for the paving of railroads are concerned. None of the provisions of the "Street Work Act" in regard to a protest against the work shall apply to any work contemplated by this section. All provisions of the "Street Work Act" not inconsistent with the provisions hereof shall apply hereto.

§ 7. The term "city treasurer," as used in this act, shall be held to mean and include any person who, under whatever name or title, is the custodian of the funds of the municipality.

§ 8. The act entitled "An act to amend an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for construction of sewers within municipalities,' approved March eighteenth, eighteen hundred and eighty-five, by adding thereto an additional part, numbered 4, consisting of sections 38, 39, 40, 41, 42, 43, and 44, relative to a system of street improvement bonds," approved March seventeen, eighteen hundred and ninety-one, is hereby repealed, except as to any and all proceedings hitherto commenced thereunder, which proceedings may be completed, and have full force as is therein provided.

§ 9. This act shall take effect and become of force from and after its passage.

3. Improvement Act of 1911.

An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities, and for establishing and changing the grades of any such streets, avenues, lanes, alleys, courts, places and sidewalks, and providing for the issuance and payment of street improvement bonds to represent certain assessments for the cost thereof and providing a method for the payment of such bonds.

Part I.

Public Streets Defined.

§ 1. All streets, lanes, alleys, places or courts, in the municipalities of this state now open or dedicated, or which may hereafter be open or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purpose of this act, and the city council of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in this act under the proceedings hereinafter described.

What Work may be Done.

§ 2. Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any portion or portions, either in length or width of any one or more of the streets, avenues, lanes, alleys, courts, places or public ways of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and to order the construction or reconstruction therein of sidewalks, cross-walks, culverts, bridges, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances; pipes, hydrants and appliances for fire protection; tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water; and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting said streets, avenues, lanes, alleys, courts, places or public ways; the planting of trees thereon, and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits, and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch-basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places, or public ways or property or rights of way of such city.

Resolution of Intention.

§ 3. Before ordering any work done or improvement made, which is authorized by this act, the city council shall pass a resolution of intention so to do referring to the street by its lawful or official name, or the name by which it is commonly known, and briefly describing the work. Said resolution of intention shall be published twice in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The city council may include in one proceeding, under one resolution of intention and in one contract, any of the different kinds of work mentioned in this act and any number of streets and rights of way or portions thereof, and it may except therefrom any of said work already done upon a street to the official grade. The lots and portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; provided, that this shall not be construed so as to affect the special provisions as to grading contained in subdivision nine of section twenty of this act.

When Chargeable on a District

§ 4. Whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots

Conditions in Contract.

§ 18. The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and to receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act; and he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the city council. The work must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, and all contracts made therefor must contain a provision to that effect, and also express notice that, in no case, except where it is otherwise provided by law or the city charter will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made. The assessment and apportionment of the expenses of all such work or improvement shall be made by the superintendent of streets in the mode provided by this act.

Bond for Labor and Material.

§ 19. Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies or corporations who perform labor on, or furnish materials to be used in the said work or improvement, and shall provide that if the contractor, person, company or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work or improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company or corporation, filing the same or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof.

four-fifths of the members of the city council. The city council may adjourn said hearing from time to time.

§ 7. When no protests have been delivered to the clerk of the city council within fifteen days after the date of the second publication of the resolution of intention or if the posting of the notice of improvement has been completed after the second publication of the resolution of intention then within fifteen days after the date of the completion of the posting of the said notice of improvement, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, or when a protest against the extent of the proposed district, shall have been heard and denied, immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements.

Plans and Specifications.

§ 8. Before passing any resolution for the construction of improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him.

Descriptions by Reference.

§ 9. In all resolutions, notices, orders and determinations subsequent to resolution of intention and notice of improvement, it shall be sufficient to briefly describe the work or the assessment district or both and to refer to the resolution of intention for further particulars.

Inviting Sealed Proposals.

§ 10. Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall pass a resolution ordering the work. Notice, with specifications, shall be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered. Notice inviting such proposals, and referring to the specifications posted or on file, shall be published twice in a daily, semi-weekly, or weekly newspaper published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. The time fixed for the opening of bids shall be not less than ten days from the time of the first publication or posting of said notice. All proposals or bids offered shall be accompanied by a check payable to the city certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall, in open session publicly open, examine and declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satisfactory to the council. The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid.

If the bids are rejected or no bids are received the city council may within six months thereafter re-advertise for proposals or bids for the performance of the work as in the first instance, without further proceedings, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bid so rejected. But the checks accompanying such accepted proposals or bids shall be held by the city clerk of said city until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage, whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects, or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city and shall be collected by it and paid into its general fund, and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund.

Notice of Awarding Contract.

§ 11. Notice of such award of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work, and shall be published twice in a daily newspaper published and circulated in said city and designated by said city council, or in cities where there is no daily newspaper by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such city, then such notice of award shall only be kept posted as hereinbefore provided.

Owners may Take Contract.

§ 12. The owners of three-fourths of the frontage of lots and lands liable to be assessed, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded, and all work done under such contract shall be subject to such regulations as may be prescribed by ordinance of the city council. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the date of such written contract, and to prosecute the same with diligence to completion, it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid.

All contracts entered into between the owners of any property and the contractor or his agents shall be in duplicate and shall contain all items of expense and the total contract price therefor, and no other payment shall be allowed to or recovered by such contractor, other than as itemized and set forth in said contract. The original of such contract shall be held by the contractor or his agent, and the duplicate shall be held by the owners, who must receipt to the agent or contractor therefor.

Re-advertising for Bids.

§ 13. But if such original bidder neglects, fails or refuses, for fifteen days after the first publication of the notice of award, to enter into the contract, then the city council, without further proceedings, shall again

advertise for proposals or bids, as in the first instance, and award the contract for said work to the then lowest regular bidder. Should no bids be received in response to this second call for proposals, the council may again advertise for bids under the same proceedings, at any time within six months from the time set for the last reception of bids, and let the contract to the then lowest bidder, and such delay shall in no way affect the validity of any of the proceedings or assessments levied thereunder. The bids of all persons and the election of all owners, as aforesaid, who have failed to enter into the contract, as herein provided, shall be rejected in any bidding or election subsequent to the first for the same work.

Delinquent Contractors.

§ 14. If the owner or contractor, who may have taken any contract, does not complete the same within the time limited in the contract, or within such further time as the city council may give him, the superintendent of streets shall report such delinquency to the city council which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance.

Bond for Faithful Performance.

§ 15. All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets of said city, with two or more sureties and payable to such city, in a sum not less than twenty-five per cent of the amount of the contract, conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above all statutory exemptions.

Protesting Erroneous Proceedings.

§ 16. At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, provided the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act.

Advancing Incidental Expenses.

§ 17. Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of publication of the notices, resolutions, orders and matters required under the proceedings prescribed in this act, and of such other notices as may be deemed requisite by the city council, together with all other incidental expenses. And in case the work is abandoned by the city before the letting of the contract the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury.

amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section, and the provisions of subdivisions one, two, three, four, five, six and seven of this section shall not be applicable to the work or improvement provided for in this subdivision.

Railroad Property.

Subdivision Eleven.—The terms, lot, lots, lands, piece or parcel of land wherever mentioned in this act shall be deemed to include and shall include property owned or controlled by any person, firm or corporation as a railroad, street or interurban railroad right of way, and whenever a railroad, street or interurban railroad right of way shall front on or about or parallel or be included within or divide longitudinally any street improved under the provisions of this act or shall be included within any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the manner and with the same effect as other lots, lands or pieces or parcels of land are assessed as provided in this act, and such railroad, street or interurban railroad right of way shall be subject to sale for nonpayment of assessments as in this act provided.

Making the Assessment.

§ 21. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done; or, if any direction and decision be given by said council on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with all incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot, or portions of a lot (if known to the street superintendent); if unknown the word "Unknown" shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram exhibiting each street or street crossing, lane, alley, place or court, on which any work has been done, and showing the relative location of each district, lot, or portion of lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed, for said work contracted for and performed

Warrant.

§ 22. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

Methods of Assessment. Frontage Assessment.

§ 20. Subdivision One.—The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

Main Street Crossings.

Subdivision Two.—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, or to the end of such street if it does not meet another, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

Main Street Terminations.

Subdivision Three.—Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main streets, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Alley and Main Street Crossings.

Subdivision Four.—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another.

Alley Crossings.

Subdivision Five.—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Six.—Where a subdivision street, avenue, lane, alley, place or court terminates in another street, avenue, lane, alley, place or court, the expense of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, avenue, lane, alley, place or court so terminating, according to its frontage thereon, halfway, on each side, respectively, to the next street, avenue, lane, alley, place or court or to the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

time to receive the amount due upon any assessment list and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued; and if any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed; provided however, that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid, said interest to be computed from the date of the recording of the return.

Final Objections.

§ 26. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council. Notice of the time and place of the hearing, as fixed by the council, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be posted conspicuously by the clerk, on or near the chamber door of the council chambers, for five days. Upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option. All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied, during the progress of the proceedings, or which it can at that time remedy. No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided,

council orders the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contracts must express the price by the cubic yard for cutting and filling in grading; and the said owner or owners and his or their successors in interest, shall be entitled to credit, on the assessment upon his or their lots and lands fronting on said streets for the grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been duly altered, only for so much of said certified work as would be required for grading to the altered grade; provided, however, that such owner or owners shall not be entitled to such credit as may be in excess of the assessments for grading upon the lots and lands owned by him or them, and proportionately assessed for the whole of said grading; and the superintendent of streets shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the duly altered grade so much of said certified work as would be required for grading thereto, and shall enter corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands owned, respectively, by said certified owners and their successors in interest; provided, however, that he shall not so include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners or their successors in interest. Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, (except grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done; provided, that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time said order is passed.

Diagram of Assessment District.

Subdivision Ten.—Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city engineer shall make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the city council, the clerk shall certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the superintendent of streets of said city, who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets or city council, on appeal, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total

amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section, and the provisions of subdivisions one, two, three, four, five, six and seven of this section shall not be applicable to the work or improvement provided for in this subdivision.

Railroad Property.

Subdivision Eleven.—The terms, lot, lots, lands, piece or parcel of land wherever mentioned in this act shall be deemed to include and shall include property owned or controlled by any person, firm or corporation as a railroad, street or interurban railroad right of way, and whenever a railroad, street or interurban railroad right of way shall front on or about or parallel or be included within or divide longitudinally any street improved under the provisions of this act or shall be included within any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the manner and with the same effect as other lots, lands or pieces or parcels of land are assessed as provided in this act, and such railroad, street or interurban railroad right of way shall be subject to sale for nonpayment of assessments as in this act provided.

Making the Assessment.

§ 21. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done; or, if any direction and decision be given by said council on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with all incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot, or portions of a lot (if known to the street superintendent); if unknown the word "Unknown" shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram exhibiting each street or street crossing, lane, alley, place or court, on which any work has been done, and showing the relative location of each district, lot, or portion of lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed, for said work contracted for and performed

Warrant.

§ 22. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

Form of Warrant.

By virtue hereof, I (name of the superintendent of streets), of the city of ——, county of —— (or city and county of ——), and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower (name of contractor) (his or their) agents or assigns, to demand and receive, the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same. (Date) ——.

——,

(Name of superintendent of streets).

Countersigned by (name of mayor).

Recording Warrant, etc.

§ 23. Said warrant, and assessment, together with the certificate, if any, of the city engineer of the quantity and character of the work done, shall be recorded in the office of said superintendent of streets, the diagram shall there be filed. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment and certificate, all persons shall be deemed to have notice of the contents of the record thereof. After said warrant, assessment, and certificate are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agent or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments.

Demanding Payment.

§ 24. The contractor or his assigns, or some person in his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made the contractor, his assigns, or some person in his or their behalf, shall receipt the same upon the assessment in presence of the person making such payment, and shall also give a separate receipt if demanded. Whenever the person so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as "Unknown" on the assessment, then the said contractor, or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed.

Contractor's Return.

§ 25. The warrant shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon, signed by the contractor, or his assigns, or some person in his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid, in whole or in part, and the amount thereof. Thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full length in a book to be kept for that purpose in his office, and shall sign the record. The said superintendent of streets is authorized at any

time to receive the amount due upon any assessment list and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued; and if any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed; provided however, that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid, said interest to be computed from the date of the recording of the return.

Final Objections.

§ 26. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council. Notice of the time and place of the hearing, as fixed by the council, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be posted conspicuously by the clerk, on or near the chamber door of the council chambers, for five days. Upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option. All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied, during the progress of the proceedings, or which it can at that time remedy. No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided,

and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done.

Contractor's Suit.

§ 27. At any time after the period of thirty-five days from the day of the date of the warrants, as herein provided, or if an appeal is taken to the city council, as provided in section twenty-six of this act, at any time after five days from the decision of said council, or after the return of the warrant or assessment, after the same may have been corrected, altered, or modified, as provided in said section twenty-six (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent but not otherwise the plaintiff shall recover such sum as the court may fix, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover the sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor. Suit may be brought in the superior court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners thereof cannot, with due diligence, be found, the service of each of said actions may be had in such manner as is prescribed in the codes and laws of this state. It shall be competent to bring a single action under any such assessment irrespective of the number of lots assessed where the parties defendant are identical and where separate actions are brought the same may be consolidated by order of the court. The said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action.

New Assessment Permitted.

§ 28. Whenever, in any suit, the lien of an assessment or reassessment, or of a bond issued for the cost of such work, shall be held invalid for any cause arising subsequent to the publication and posting of the resolution of intention and the posting of the notices of improvement along the line of work, or because the work or any part thereof is not sufficiently described in the resolution of intention, the contractor or his assigns, or the holder of such bond shall have the right, within sixty days thereafter, to apply for and receive a new assessment for the cost of the work done and sufficiently described in the resolution of intention, or specifications on file, such cost to be assessed upon the property and in the same manner as provided in sections twenty and twenty-one of this act; and the street superintendent shall, within twenty days after such application, make and deliver to said

applicant a new assessment, warrant and diagram in accordance with the law governing the issuance of originals of such documents, and the mayor shall in like manner countersign the said warrant, which reassessment shall be a lien on the property so assessed for two years from the date of the recording of said reassessment and warrant and be enforced in the same manner as an original assessment would be enforced. If an appeal be taken from the judgment in which such an assessment is held invalid, the time herein provided for making application for a new assessment shall not begin until such case be in some manner finally disposed of.

Selling Premises on Execution.

§ 29. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts; and on appeal, the appellate courts shall be vested with the same power to adjudge and decree a lien and to order such premises to be sold on execution or decree as is conferred on the court from which an appeal is taken. Such premises, if sold, may be redeemed as in other cases. In all suits now pending, or hereafter brought under this act to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the codes of this state.

Partial Assessment.

§ 30. The city council, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as provided in the preceding sections.

Repairs.

§ 31. When any portion of any improved street, avenue, lane, alley, court, or place in said city, or any sidewalk constructed thereon shall be out of repair, or needing reconstruction, and in condition to endanger persons or property passing thereon, or in condition to interfere with the public convenience in the use thereof, it shall be the duty of said superintendent of streets to require, by notice in writing, to be delivered to them or to their agents personally, or left on the premises, the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court, or place, or said portion of said sidewalks so out of repair or needing reconstruction as aforesaid, to repair or reconstruct, or to do both, forthwith, said portion of said street, avenue, lane, alley, court, or place, to the center line of said street in front of the property of which he is the owner, or tenant, or occupant; and said superintendent of streets shall particularly specify in said notice what work is required to be done, and how the same is to be done, and what material shall be used in said repairs, or reconstructions, or both. If said repairs, or reconstructions, or both, be not commenced within three days after notice given as aforesaid, and diligently and without interruption prosecuted to completion, the said superintendent of streets may, under authority from said city council, make such repairs, reconstructions, or both, or enter into a contract with any suitable person, at the expense of the owner, tenant, or occupant, after the specification for the doing of said work shall have been conspicuously posted by him

in his office for two days, inviting bids for the doing of said work, which bids shall be delivered to him at his office on or before the second day of said posting, and opened by him on the next day following the expiration of said two days of posting, and the contract by him be awarded to the lowest bidder, if such lowest bid, in the judgment of said street superintendent, shall be reasonable. All of said bids shall be preserved in his office and open at all times after the letting of the contract to the inspection of all persons, and such owner, tenant, or occupant shall be liable to pay said contract price. Such work shall be commenced within twenty-four hours after the contract shall have been signed, and completed without delay to the satisfaction of said street superintendent. Upon the completion of said repairs, or reconstruction, or both, by said contractors as aforesaid, to the satisfaction of said superintendent of streets, said superintendent of streets shall make and deliver to said contractor a certificate to the effect that said repairs, or reconstruction, or both, have been properly made by said contractor to the grade, and that the charges for the same are reasonable and just, and that he, said superintendent, has accepted the same.

Suit for Repairs.

§ 32. If the expenses of the work and material for such improvement, after the completion thereof, and the delivery to said contractor of said certificate, be not paid to the contractor so employed, or his agent or assignee, on demand, the said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant, for the amount contracted to be paid; and said certificate of the superintendent of streets shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the said superintendent of streets in a book kept by him in his office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien, the same as provided in section twenty-three of this act, and may be enforced in the same manner.

Additional Penalty for Neglecting Repairs.

§ 33. In addition, and as cumulative to the remedies above given, the city council shall have power, by resolution or ordinance, to prescribe the penalties that shall be incurred by any owner or person liable, or neglecting, or refusing to make repairs when required, as provided in section thirty-one of this act, which fines and penalties shall be recovered for the use of the city by prosecution in the name of the people of the state of California in the court having jurisdiction thereof, and may be applied, if deemed expedient by the said council, in the payment of the expenses of any such repairs not otherwise provided for.

Tenant may Pay Assessment.

§ 34. Any tenant or lessee of the lands or lots liable may pay the amount assessed against the property of which he is the tenant or lessee under the provisions of this act, or he may pay the price agreed on to be paid under the provisions of section thirty of this act, either before or after suit brought, together with costs, to the contractor, or his assigns, or he may redeem the property, if sold on execution or decree for the benefit of the owner, within the time prescribed by law, and deduct the amount so paid from the rents due and to become due from him, and for any sums so paid beyond the rents due from him, he shall have a lien upon and may retain possession of the said land and lots until the amount so paid and advanced be satisfied, with legal interest, from accruing rents, or by payment by the owner.

Service of Notice.

§ 35. Notices in writing which are required to be given by the superintendent of streets, under the provisions of this act, may be served by any person, with the permission of the superintendent of streets, and the fact of such service shall be verified by the oath of the person making it, taken before the superintendent of streets, who for that purpose, and for all other purposes, and in all cases where a verification is required under the provisions of this act, is hereby authorized to administer oaths, or other person authorized to administer oaths or such notices may be delivered by the superintendent of streets himself, who must also verify the service thereof, and who shall keep a record, of the fact of giving such notices, when delivered by himself personally, and also of the notices and proof of service when delivered by any other person.

Accepted Streets.

§ 36. Whenever any street, or portion of a street, has been or shall hereafter be fully constructed and substantially paved in accordance with specifications adopted by the council, and to the satisfaction of the superintendent of streets, and of the city council, and is in good condition throughout, and a sewer, gas-pipes, and water-pipes are laid therein, under such regulations as the city council shall adopt, the same may be accepted by the city council, by ordinance, for all time or for a term of years, as the council may determine, and thereafter the same shall be kept in repair and improved by the said municipality, for the period of such acceptance; the expense thereof, together with the assessment for street work done in front of city property, to be paid out of a fund to be provided by said council for that purpose; provided, that the city council shall not accept any portion of the street less than the entire width of the roadway (including the curbing), and one block in length, or one entire crossing; and, provided further, that the city council may partially or conditionally accept any street, or portion of a street, without a sewer, or gas-pipes, or water-pipes therein, if the ordinance of acceptance expressly states that the council deems such sewer, or gas-pipes, or water-pipes, to be then unnecessary, but the lots of land previously, or at any time, assessable for the cost of constructing a sewer, shall remain and be assessable for such cost, and for the cost of repairs and restoration of the street damaged in the said construction, whenever said council shall deem a sewer to be necessary, and shall order it to be constructed, the same as if no partial or conditional acceptance had ever been made. The superintendent of streets shall keep in his office a register of all streets accepted by the city council under this section, which register shall be indexed for easy reference thereto.

Records of Street Superintendent.

§ 37. The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge.

Duty of Street Superintendent.

§ 38. It shall be the duty of the superintendent of streets to see that the laws, ordinances, orders, and regulations relating to the public streets and highways be fully carried into execution, and that the penalties thereof

are rigidly enforced. He shall keep himself informed of the condition of all the public streets and highways, and also of all public buildings, parks, lots, and grounds of said city, as may be prescribed by the city council. He shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties and for such sums as may be required by the city council; and should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect. He shall superintend and direct the cleaning of all sewers, and the expense of the same shall be paid out of the street or sewer fund of said city.

Damages—Defective Streets.

§ 39. If, in consequence of any graded street or public highway or sidewalk, being out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using said street or public highway, or sidewalk and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after written notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city.

Partial Expenses from Treasury.

§ 40. The city council may, in its discretion, order, by resolution that the whole or any part of the cost and expenses of any of the work mentioned in this act be paid out of the treasury of the municipality from such fund as the council may designate, in which case it shall be so stated in the resolution of intention. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, in making up the assessment heretofore provided for such cost and expenses, shall first deduct from the whole cost and expenses such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said costs and expenses proportionately upon the lots, parts of lots and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided.

City Engineer.

§ 41. The city engineer, or where there is no city engineer, the county or city and county surveyor, shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable

delinquency no assessment shall be received unless said five per cent together with all costs be paid therewith.

Sale of Property.

§ 54. The said superintendent of streets shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece or parcel of land separately assessed. Said list of delinquent assessments, with a notice of the time and place of sale of the property affected thereby, shall be published twice in one or more daily newspapers published and circulated in such city, or in a weekly newspaper so published and circulated before the day of sale for such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of said superintendent of streets. If any assessment together with said penalty and costs be not paid before the time of sale the street superintendent shall proceed to sell and shall sell each lot, piece or parcel of land separately assessed at public auction to the bidder offering to pay the amount due for the least portion of such lot, piece or parcel of land so offered for sale, and shall issue a certificate therefor. If there be no bidder said property shall be struck off to the municipality.

Redeemable Within Year.

§ 55. All property sold shall be subject to redemption for one year by the payment of the amount of the assessment, penalty and costs and interest thereon at the rate of ten per cent per annum from the date of sale. The superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale, or his consignee, a deed conveying the property sold, and shall collect for each deed one dollar. The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee.

Separate Funds.

§ 56. The superintendent of streets shall from time to time pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating each fund by the name of the street, square, lane, alley, court, or place for the change of grade for which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners or a majority of them.

Notice of Damages Awarded.

§ 57. When sufficient money is in the hands of the city treasurer, in the fund voted for the proposed work or improvement, to pay the total cost for damages, as well as for the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which can be received at the office of such commissioners. Such notification may be made by depositing a notice, postage prepaid, in the postoffice, addressed to his last known place of residence. If, after the expiration of three days

or streets where such change of grade is made, may file a petition with the clerk of the city council showing the fact of such ownership, the description and situation of the property, its market value, and the estimated amount of damages over and above all benefits which the property would sustain by the proposed change if completed. Such petition shall be verified by the oath of the petitioners or their agents.

Commissioners.

§ 45. Whenever such petition or petitions have been filed, the mayor, engineer or surveyor, and superintendent of streets of the city, or city and county, or board of public works if there be such board acting as a board of commissioners, shall assess the benefits, damages, and costs of the proposed change of grade upon each separate lot of land situated within such assessment district showing the same by a plat as said lot appears of record upon the last city, or city and county assessment-roll. The commissioners shall be sworn to make the assessments of benefits and damages to the best of their judgment and ability, without fear or favor. The commissioners shall have power to subpoena witnesses to appear before them to be examined under oath, which any one of said commissioners is authorized to administer.

Damages and Benefits.

§ 46. The commissioners having determined the damage which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges, and expenses of the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvement; and during the progress of their work shall make a report to such city council as often as it may be required.

Report of Commissioners.

§ 47. The commissioners shall make their report, in writing, and shall subscribe to the same and file it with the city council. In their said report they shall describe separately each piece of property which will sustain damage, stating the amount of damages each will sustain over and above all benefits. They shall also give a brief description of each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of damages assessed against the same. In case the three commissioners do not agree, the award agreed upon by a majority of them shall be sufficient. In designating the lots to be assessed, reference may be had to a diagram of the property in the district affected; such diagram to be attached to and made a part of the report of the commissioners. If in case the commissioners find that conflicting claims of title exist, or shall be in ignorance or doubt of the ownership of any lot or land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any land or improvements, or particulars of their interest, shall not affect the validity of the assessment.

Notice of Hearing Report.

§ 48. On the filing of said report, the clerk of said city council shall give notice of such filing by publication twice in one or more daily newspapers, or in a weekly or semi-weekly newspaper so published and circulated; and said notice shall require all persons interested to show cause, if any, why

such report should not be confirmed, before the city council, on a day to be fixed by the city council and stated in said notice, which day shall not be less than twenty days from the first publication thereof.

Objections to Report.

§ 49. All objections shall be in writing and filed with the clerk of the city council, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the council, which shall fix a time for hearing the same; of which time the clerk shall notify the objectors in the same manner as are notified objectors to the original resolution of intention. At the time set, or at such other time as the hearing may be adjourned, the city council shall hear such objections and pass upon the same, and at such time shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given and had, as in the case of an original report.

Advertising for Bids.

§ 50. In case the resolution of intention also provides for the assessing upon the district the cost of regrading or repaving such street or streets to such changed or modified grade, after the report of the commissioners as to the damages caused by such change of grade has been passed upon by the city council, it shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking or curbing such street or streets with the same or other material with which the same had been formerly graded, paved, sewered, sidewalked, or curbed; first causing a notice, with specifications, to be posted conspicuously for five days on or near the council chamber door, inviting sealed proposals or bids for doing such work, and shall also cause notices of said work, inviting said proposals and referring to the specifications posted or on file, to be published twice, in a daily, semi-weekly, or weekly newspaper published and circulated in said city, and designated by the city council for that purpose. All proposals or bids offered shall be accompanied by a check, payable to the city, and certified by a responsible bank, which shall not be less than ten per cent of the aggregate of the proposals; or by a bond for said amount, signed by the bidder and two sureties, who shall justify under oath in double said amount over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of the said city council, and said council shall in open session publicly open, examine and declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by a check or a bond satisfactory to the council. The city council may reject any and all bids, and may award the contract to the lowest responsible bidder. If not accepted the city council may re-advertise for proposals or bids as in the first instance, and thereafter proceed in the manner in this section provided. All checks accompanying bids shall be held by the clerk until such successful bidder has entered into a contract, as herein provided; and in case he refuses so to do, then the amount of his certified check shall be declared forfeited to the city, and shall be collected and paid into its general fund, and all bonds so forfeited shall be prosecuted, and the amount thereof collected and paid into such fund. Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore in this section provided for the posting of proposals for said work.

Making Assessment.

§ 51. After such contract has been awarded and entered into, the clerk of the city council shall certify to the city council that fact, together with the total amount of the cost of the same, whereupon the city council shall cause to be forwarded to the commissioners a copy of such certificate; whereupon such commissioners shall proceed to assess the cost of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the same, according to the benefits it receives from the work, and in the same manner in which the damages caused by the change of grade were assessed upon the same. Such commissioners in making such assessment shall show the total amount for which each lot or tract is assessed, in excess of all benefits, for the total cost of changing and modifying the grade of the street, as well as the regrading, repaving, sewering, sidewalking, and curbing of the same, and costs or damages connected therewith. The provisions of part I of this act in regard to the mode or manner of the assessment of the cost of such work shall not apply to the work in this part contemplated; neither shall the provisions of this act in regard to the issuing of bonds to represent the cost of the same, nor the provisions in regard to the right of protest against the work apply.

Assessment-roll.

§ 52. The clerk of said city council shall forward to the street superintendent of the city a certified copy of the report, assessment, and plat, as finally confirmed and adopted by the city council. Such certified copy shall thereupon be the assessment-roll, the cost of which shall be provided for by the commissioners, as a portion of the cost of the proceedings therein. Immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein.

Collecting Assessments.

§ 53. The superintendent of streets shall thereupon give notice, by publication twice in one or more daily newspapers published and circulated in said city, or city and county, or in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of such delinquent assessment, together with the cost of advertising each delinquent assessment will be added thereto. When payment of any assessment is made to said superintendent of streets, he shall write the word "Paid" and the date of payment opposite the respective assessment so paid, and the name of the persons by or for whom said assessment is paid, and shall give a receipt therefor. On the expiration of said thirty days, all assessments then unpaid shall be and become delinquent, and said superintendent of streets shall certify such fact at the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent. After the date of said

delinquency no assessment shall be received unless said five per cent together with all costs be paid therewith.

Sale of Property.

§ 54. The said superintendent of streets shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece or parcel of land separately assessed. Said list of delinquent assessments, with a notice of the time and place of sale of the property affected thereby, shall be published twice in one or more daily newspapers published and circulated in such city, or in a weekly newspaper so published and circulated before the day of sale for such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of said superintendent of streets. If any assessment together with said penalty and costs be not paid before the time of sale the street superintendent shall proceed to sell and shall sell each lot, piece or parcel of land separately assessed at public auction to the bidder offering to pay the amount due for the least portion of such lot, piece or parcel of land so offered for sale, and shall issue a certificate therefor. If there be no bidder said property shall be struck off to the municipality.

Redeemable Within Year.

§ 55. All property sold shall be subject to redemption for one year by the payment of the amount of the assessment, penalty and costs and interest thereon at the rate of ten per cent per annum from the date of sale. The superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale, or his consignee, a deed conveying the property sold, and shall collect for each deed one dollar. The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee.

Separate Funds.

§ 56. The superintendent of streets shall from time to time pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating each fund by the name of the street, square, lane, alley, court, or place for the change of grade for which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners or a majority of them.

Notice of Damages Awarded.

§ 57. When sufficient money is in the hands of the city treasurer, in the fund voted for the proposed work or improvement, to pay the total cost for damages, as well as for the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which can be received at the office of such commissioners. Such notification may be made by depositing a notice, postage prepaid, in the postoffice, addressed to his last known place of residence. If, after the expiration of three days

after the service or deposit of the notice in the postoffice, he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer, to be delivered to him upon demand.

Condemnation Proceedings.

§ 58. If the owner of any premises damaged neglects or refuses, for ten days after the warrant has been placed in the hands of the city treasurer, subject to his demand, to accept the same, the city council may cause proceedings to be commenced, in the name of the city, to condemn said premises, as provided by law under the right of eminent domain. The resolution of intention shall be conclusive evidence of the necessity of the same. Such proceedings shall have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of a special fund in the treasury for that purpose. At any time after the trial and judgment entered, or pending appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum from said fund to answer the judgment, and thereupon may authorize or order the municipality to proceed with the proposed work or improvements. In case of a deficiency in said fund to pay the whole assessed judgment and damages, the city council may, in its discretion, order the balance thereof to be paid out of the general fund of the treasury, or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last-named case, in order to avoid delay, the city council may advance such balance out of any available fund in the treasury, and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation; provided, that warrants for damages and for costs of performing the work shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money remains in the fund to pay all warrants of the first class before paying any of the second. The provisions of section one thousand two hundred and fifty-one of the Code of Civil Procedure, requiring the payment of damages within thirty days after the entry of judgment, shall not apply to damages rendered in proceedings under this act. All provisions contained in parts I and IV of this act, which provisions are not in conflict herewith, shall apply to all matters herein contained.

Part III.

Serial Bonds may be Issued.

§ 59. The city council of any municipality in this state shall have the power, in its discretion, to determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in part I of this act.

When and Where Payable.

§ 60. Said serial bonds shall extend over a period not to exceed nine years from the second day of January next succeeding their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year, at the rate of not to exceed ten per cent per annum on all sums unpaid, until the whole of said principal and interest are paid.

Said bonds and interest thereon shall be paid at the office of the city treasurer of said municipality, who shall keep a fund designated by the name of said bonds, into which he shall receive all sums paid him for the principal of said bonds and the interest thereon, and from which he shall disburse such sums, upon the presentation of said coupons; and under no circumstances shall said bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee and indorsees of each bond, and the number and amount of each coupon of principal or interest paid by him, and shall cancel and file each coupon so paid.

Notice in Resolution of Intention.

§ 61. When said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section twenty-two of this act.

Notification to Treasurer.

§ 62. After the full expiration of thirty days from the date of the warrant, or if an appeal be taken to the city council as provided in this act, then five days after the final decision of said council, and after the street superintendent shall have recorded the return, as provided in section twenty-five hereof, the street superintendent shall make and certify to the city treasurer a complete list of all assessments unpaid, which amount to twenty-five dollars or over, upon any assessment or diagram number; and said treasurer shall thereupon make out, sign, and issue to the contractor, or his assigns, payee of the warrant and assessment, a separate bond, representing upon each lot or parcel of land upon said list the total amount of the assessments against the same, as thereon shown. And if said lot or parcel of land is described upon said assessment and diagram by its number or block, or both, and is also designated by its number or block, or both, upon the official map of said municipality, or upon any map on file in the office of the county recorder of the county in which said municipality is situated, then it shall be in said bond a sufficient description of said lot or parcel of land to designate it by said number or block, or both, as it appears on said official or recorded map.

Form of Bond.

§ 63. Said bond shall be substantially in the following form:

Street Improvement Bond.

Series (designating it), in the city (or other form of the municipality) of (naming it).

$—— 100. No. ——

Under and by virtue of an act of the legislature of the state of California (title of this act), I, out of the fund for the above designated street improvement bonds, series ——, will pay to ——, or order, the sum

of —— dollars ($——) with interest at the rate of —— per cent per annum, all as is hereinafter specified, and at the office of the —— treasurer of the —— of ——, state of California. This bond is issued to represent the cost of certain street work upon ——, in the —— of ——, as the same is more fully described in assessment number ——, issued by the street superintendent of said ——, after his acceptance of said work, and recorded in his office. Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and in the diagram attached thereto, as number ——, and which now remains unpaid, but until paid, with accrued interest, is a first lien upon the property affected thereby, as the same is described herein, and in said recorded assessment with its diagram, to wit: the lot or parcel of land in said —— of ——, county of ——, state of California, ——.

This bond is payable exclusively from said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise of its principal or interest. The term of this bond is —— years from the second day of January next succeeding its date, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the second day of January of each year after its date an even annual proportion of its whole amount is due and payable, upon presentation of the coupon therefor, until the whole is paid, with all accrued interest at the rate of —— per centum per annum.

The interest is payable semi-annually, to wit: On the second days of January and of July in each year hereafter, upon presentation of the coupons therefor, the first of which is for the interest from date to the next second day of ——, and thereafter the interest coupons are for semi-annual interest, except the last, which is for interest from the semi-annual payment next preceding and to the date of the final maturity of this bond.

Should default be made in the annual payment upon the principal, or in any payment of interest from the owner of said lot or parcel of land, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have said lot or parcel of land advertised and sold forthwith, in the manner provided by law.

At said —— of —— this —— day of ——, in the year one thousand —— hundred and ——.

——,

City Treasurer of the —— of ——.

Limitation of Twenty-five Dollars.

§ 64. In case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is hereinbefore provided in part one of this act.

Owner may Stop Issuance.

§ 65. If any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records that he is such owner of record, and with such affidavit and certificate such person notifies said treasurer in writing that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection as if said lot or parcel of land had not been so listed by the street superintendent.

Description of Bonds.

§ 66. The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work. They shall have annual coupons attached thereto, payable in annual order, on the second day of January in each year after the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, the first of which shall be payable upon the second day of January or July, as the case may be, next after its date, and shall be for the interest accrued at that time, and the last of which shall be for the amount of interest accruing from the second day of January or July, as the case may be, next preceding the maturity of said bonds to the maturity thereof. The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under this act.

Penalty for Default.

§ 67. Whenever, through the default of the owner of any lot or parcel of land to represent the assessment upon which such bond has been, or may hereafter be, issued, and payment, either upon the principal, or of the interest, has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond thereupon demands, in writing, that the said city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent.

Sale of Property.

§ 68. Upon the application of the holder of any bond that is now or shall hereafter become delinquent as hereinbefore provided, the said city treasurer shall publish twice in a newspaper of general circulation, to be designated by him, published in the city where his office is situated, a notice which must contain the date, number, and series of the delinquent bond, a description of the property mentioned in said bond, and the name of the owner of such property (if known), and if unknown, the fact shall be so stated, the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the cost of publication of such notice are paid, the real property described in said bond will be sold at public auction on a day to be therein fixed, which shall not be less than fifteen nor more than thirty days from the day of the first publication of said notice, and the place of such sale, which must be the office of the said city treasurer.

A like notice shall not less than fifteen days before the day of sale so fixed be served upon any such owner if known, either personally or by depositing the same in the postoffice at such city, addressed to such owner at his address, if known, with the postage thereon prepaid.

At any time prior to the sale, the owner or person in possession of any real estate offered for sale under the provisions of this act may pay the whole amount of said bond then due, with costs, and such bond shall thereupon be canceled; but in case such payment is not made by such owner, or person in possession, or by some one in behalf of such owner, or person in possession, the property subject thereto shall be sold at public auction to the bidder offering to pay the amount due on the bond with costs for the least portion of such lot or parcel of land offered for sale.

Treasurer's Affidavit.

§ 69. The city treasurer, before the day of sale hereinafter provided for, must file with the city clerk a copy of the publication, with an affidavit of the publisher of such newspaper, or someone in his behalf, attached thereto, that it is a true copy of the same; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication was made—which affidavit is prima facie evidence of all the facts stated therein.

Costs and Fees.

§ 70. The city treasurer must collect, in addition to the amount due on such bond, the cost of the publication of such notice, and fifty cents for the certificate of sale delivered to the purchaser as hereinafter provided.

Certificate of Treasurer.

§ 71. The city treasurer, before delivering any certificate of sale must, in a book kept in his office for that purpose, enter the date, number and series of the bond, a description of the land sold corresponding with the description in the certificate, the date of sale, purchaser's name, the amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection during office hours when not in actual use, and he shall enter on the record of the bond the words "canceled by sale of the property," giving the date of such sale.

Lien on the Property.

§ 72. Immediately on the sale, the purchaser shall become vested with a lien on the property so sold to him, to the extent of his bid, and is only divested of such lien by the payment to the city treasurer of the purchase money, including costs herein provided for, with interest thereon at the rate of one per cent per month from the date of sale.

Redemption.

§ 73. A redemption of the property sold may be made by the owner of the property, or any party in interest, within twelve months from the date of purchase, or at any time prior to the application for a deed, as hereinafter provided. Redemption must be made in lawful money of the United States, and when made to the city treasurer he must credit the amount paid to the person named in his certificate, and pay it on demand to him or his assignees.

Recording Certificate.

§ 74. On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the city treasurer, the fee for which shall be fifty cents, and on presentation of the receipt of the city treasurer for the total amount of the redemption

money, the recorder must, without charge, mark the word "redeemed," the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made.

Deed to Purchaser.

§ 75. If the property is not redeemed within the time allowed by the provisions of section seventy-three hereof for its redemption, the city treasurer, or his successor in office, upon application of the purchaser or his assignee, must make to said purchaser, or his assignee, a deed to the property, reciting in the deed, substantially, the matter contained in the certificate and that no person has redeemed the property during the time allowed for its redemption; the treasurer shall be entitled to receive from the purchaser two dollars for making said deed, which shall be deposited in the city treasury for the use of the city after payment has been made therefrom for the acknowledgment of said deed; provided, however, that the purchaser of the property, or his assignee, or agent must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate of sale, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties, and costs in this act required. In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; and no deed to the property sold, in accordance with the provisions of this act, shall be issued by the city treasurer to the purchaser of such property, until such purchaser shall have filed with such treasurer an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the said treasurer as other records kept by him in his office. Such purchaser shall be entitled to receive the sum of fifty cents for his service of such notice and the making of such affidavit, which sum of fifty cents shall be paid by the redemptioner at the time and in the same manner as the other sums, costs, and fees are paid.

Absolute Title.

§ 76. The deed, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had and shall be conclusive evidence of all things of which the bond upon which it is based is conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issue of the bond, and conveys to the grantee the absolute title to the lands described therein, free of all encumbrances, except the lien for state, county, and municipal taxes.

Railroad Property.

§ 77. Whenever any railroad track or tracks of any description exist upon the street or streets upon which the city council of any city has ordered an improvement to be made, and has excepted therefrom the portions used by the track, between the rails and for two feet on each

side thereof, and between the tracks if there is more than one, the said order, unless said city council shall by resolution theretofore passed have declared the contrary, shall be deemed to be and constitute a requirement that the person or company having said railroad track or tracks thereon shall improve the said portion with improvements similar in all respects to, with the same materials, under the same specifications and superintendence, and to the like inspection and satisfaction as those ordered to be performed by said order ordering the work; provided, however, that the city council may by ordinance require increased depth of concrete between, to the full depth of, or under the ties, or both, where and whenever the city council shall, in its judgment decide that this method of construction is necessary. The city council may also require by ordinance or otherwise, any person or company aforesaid, to pave alongside of and contiguous to its rails with special types of brick or paving blocks. The resolution of intention and notice of proposed improvement shall be construed and are hereby declared to be notice to said person or company of the intention to order the same. Thereupon it shall be the duty of said person or company having such track or tracks on such street or streets to notify in writing the superintendent of streets if such person or company elects to enter upon the direct performance of such work at its own charge and expense; said notice must be delivered to the superintendent of streets within ten days after the first publication of notice of award of contract. The omission or neglect to make such election shall be construed as constituting the superintendent of streets the agent of the owner of said track or tracks, with authority to enter into a contract made in accordance with the provisions of this section for making the said improvements. Said superintendent of streets shall advertise for bids for the improvement of said portions of the street or streets lying between the rails and for two feet on each side thereof, and between the tracks, if there be more than one. It shall be the duty of said city council to award the contract for the making of said improvements to the lowest regular responsible bidder. Such bidding and awarding of contracts shall be made in the same manner hereinbefore provided for the awarding of contracts for improvements excepting that no notice of award shall be published. Immediately upon the award, the superintendent of streets shall enter into a contract with the person to whom said contract was awarded for the making of said improvement or improvements upon the portions of the street or streets described in said notice inviting bids, and at the price stated in said bid. The contractor shall execute bonds in the manner required by section fifteen of this act. Upon the completion of the work and its acceptance, the street superintendent shall make a certificate of such completion together with a statement of the amount due under the terms of said contract for the performance of said work. Such certificate shall be countersigned by the mayor of said city, and shall be recorded in the office of said superintendent of streets. The contractor thereupon shall be entitled to payment of the full amount of said contract price, and the recording of such certificate shall be sufficient notice to the owner of such track or tracks that said contract price is due and payable. In the event that such amount is not paid within thirty days from the date of the recording of said certificate, the contractor may file a sworn statement to that effect with the superintendent of streets, who shall record the same in his office in the book in which the certificate of acceptance has been recorded. Said contractor shall thereupon

have a cause of action against said person or company owning said tracks for the amount of said contract, together with a reasonable attorney's fee, and shall also have as a security for the recovery of such amount, a first lien upon the track and franchises of said railroad, between whose rails or tracks the said work has been performed, contained within the corporate limits of the said city. In such suit, the certificate of the superintendent of streets, hereinbefore mentioned, shall be and constitute prima facie evidence of the regularity of all proceedings, and of the right of the contractor to recover judgment against said person or company. Execution may be taken out upon the entry of judgment, and levied upon any property of said person or company subject to execution. In the event that said person or company shall file the written election to enter upon the direct performance of such work at its own cost and expense, no further proceedings shall be taken in the matter unless such person or company neglects or fails for thirty days, or for such further time as the city council may grant, to make said improvement. In the event that the improvement of the portions of the street or streets above described between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, shall not be made with diligence, as herein provided or in all respects similar to the improvement of the rest of the street, or with the same materials or under the same specifications, and to the satisfaction of the superintendent of streets, the city council of said city may, by resolution entered in its minutes, prescribe such terms and conditions as to it may seem fit and proper before permitting the said person or company to continue with the said improvement. If the said person or company shall, after three days' notice of the adoption of said resolution, fail to comply with the terms and conditions so prescribed, the city council may declare said person or company to have forfeited its privilege of performing such work under its own direction. Whereupon the street superintendent shall advertise for bids for the performance of such work, or such portion thereof as may remain uncompleted, and the contract therefor shall be awarded and entered into in the same manner hereinbefore provided for the awarding and execution of contracts where said person or company has not elected to make the improvements under its own direction; and upon the completion of the improvement the contractor to whom such contract may be awarded, or his assigns, shall be entitled to a certificate from the street superintendent similar to that hereinabove provided for, and shall have the right to collect from said person or company by suit the amount specified in said certificate in all respects the same as hereinbefore provided where the contract is let for such improvement in the first instance. The city council may, by ordinance, prescribe and enforce such additional regulations and penalties as it may deem, necessary to compel the improvement as herein provided of any portion or portions of any such street or streets so occupied by any such railroad track or tracks.

No Protests.

§ 78. None of the provisions of part I of this act in regard to a protest against the work shall apply to any work contemplated by the preceding section. All provisions of part I of this act not inconsistent with the provisions hereof shall apply hereto.

Part IV.

Definitions.

§ 79. First. The person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as the executor, administrator, or guardian of the owner, shall be regarded, treated, and deemed to be the "owner" (for the purpose of this law), according to the intent and meaning of that word as used in this act. And in case of property leased, the possession of the tenant or lessee holding and occupying under such persons shall be deemed to be the possession of such owner.

Second. The words "work," "improve," "improved" and "improvement," as used in this act shall include all work mentioned in this act, and also the construction, reconstruction and repairs, of all or any portion of said work.

Third. The term "incidental expenses," as used in this act, shall include the compensation of the city engineer for work done by him; also the cost of printing and advertising as provided in this act; also, the compensation of the person appointed by the superintendent of streets to take charge of and superintend any of the work mentioned in this act; also the expenses of making the assessment for any work authorized by this act. All demands for incidental expenses mentioned in this subdivision shall be presented to the street superintendent by itemized bill, duly verified by oath of the demandant.

Fourth. The notices, resolutions, orders or other matter required to be published by the provisions of this act, shall be published in a daily newspaper, in cities where such there is, and where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council of such city, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that in case there is no daily, semi-weekly, or weekly newspaper printed or circulated in any such city, then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such city except where herein otherwise specifically provided. Proof of the publication or posting of any notice provided for herein shall be made by affidavit of the owner, publisher, printer or clerk of the newspaper, or of the poster of the notice. No publication or notice, other than that provided for in this act, shall be necessary to give validity to any of the proceedings provided for therein. The word "twice" as used in this act, referring to the number of times notices, resolutions or other matters shall be published, shall be held to mean the publication of the same in two entire issues of a newspaper, one being on one day and the other issue being on a subsequent day of the same or a subsequent week.

Fifth. The word "municipality" and the word "city" as used in this act, shall be understood and so construed as to include, and is hereby declared to include, all corporations heretofore organized and now existing, and those hereafter organized, for municipal purposes.

Sixth. The words "paved" or "repaved," as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamiz-

ing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance or resolution adopt.

Seventh. The word "street" as used in this act, shall be deemed to, and is hereby declared to, include avenues, highways, lanes, alleys, crossings, or intersections, courts and places, which have been dedicated and accepted according to law or in common and undisputed use by the public for a period of not less than five years next preceding, and the term "main street" means such actually opened street or streets as bound a block; and the word "blocks," whether regular or irregular, shall mean such blocks as are bounded by main streets, or partially by a boundary line of the city.

Eighth. The terms "street superintendent" and "superintendent of streets," as used in this act, shall be understood and so construed as to include, and are hereby declared to include, any person or officer whose duty it is, under the law, to have the care or charge of the streets, or the improvement thereof in any city. In all those cities where there is no street superintendent or superintendent of streets, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of street superintendent or superintendent of streets; and all provisions hereof applicable to the street superintendent or superintendent of streets shall apply to such person so appointed.

Ninth. The term "city council" is hereby declared to include any body or board which, under the law, is the legislative department of the government of any city.

Tenth. In municipalities in which there is no mayor, then the duties imposed upon said officer by the provisions of this act shall be performed by the president of the board of trustees, or other chief executive officer of the municipality.

Eleventh. The terms "clerk" and "city clerk" as used in this act, are hereby declared to include any person or officer who shall be clerk of the said city council.

Twelfth. The term "quarter block" as used in this act, as to irregular blocks, shall be deemed to include all lots or portions of lots having any frontage on either intersecting street half way from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city.

Thirteenth. The term "city treasurer" as used in this act shall be held to mean and include any person who, under whatever name or title, is the custodian of the funds of the municipality.

Hearings.

§ 80. Whenever in proceedings hereunder, a time and place for hearing by the city council is fixed, and from any cause, the hearing is not then and there held or regularly adjourned to a time and place fixed, the power of the city council in the premises shall not thereby be divested or lost but the city council may proceed anew to fix a time and place for the hearing and cause notice thereof to be given by publication by at least one insertion in a daily, semi-weekly or weekly newspaper, such publication to be at least five days before the date of the hearing, and thereupon the city council shall have power to act as in the first instance.

Publication and Posting.

§ 81. Whenever any resolution, order, notice, or determination is required to be published or posted, and the duty of posting or procuring the publication or posting of the same is not specifically enjoined upon any officer of the city it shall be the duty of the city clerk to post or procure the

publication or posting thereof, as the case may be. No proceeding or step herein shall be invalidated or affected by any error or mistake or departure herefrom as to the officer or person posting, or procuring the publication or posting, of any resolution, notice, order or determination hereunder when the same is actually published or posted for the time herein required.

Construction of Act.

§ 82. This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided.

Saving Clause.

§ 83. This act shall in no wise affect an act entitled: "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885; or an act entitled: "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for payment of said bonds," approved February 27, 1893; or an act entitled: "An act to provide for local improvements upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities, such act to be known as the 'local improvement act of 1901,'" which became a law February 26, 1901, or an act entitled: "An act to provide for the improvement of public streets, lanes, alleys, courts, and places in municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," which became a law April 21, 1909, or amendments to any of said acts, or any other acts on the same subject, or apply to proceedings had thereunder, but is intended to and does provide an alternate system for making the improvements provided for by this act; and it shall be in the discretion of the legislative body of any city to proceed, under the provisions either of this act or of such other acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict herewith shall be void and of no effect as to the proceedings commenced under this act. This act may be designated and referred to as the "Improvement Act of 1911," and shall take effect and be in force on its passage and approval.

4. Local Improvement Act of 1901.

An act to provide for local improvements upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities, such act to be known as "The Local Improvement Act of 1901."

[Became a law under constitutional provisions without governor's approval, February 26, 1901. Stats. 1901, p. 34.]

§ 1. All streets, lanes, alleys, places, or courts in the municipalities of this state, now open or dedicated, or which may hereafter be opened or dedicated to public use, shall be deemed and be held to be open public streets, lanes, alleys, places, or courts, for the purposes of this act, and the legisla-

tive body of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in section 2 of this act, under the proceedings hereinafter described.

§ 2. Whenever the public interest or convenience may require, the legislative body is hereby authorized and empowered to order the whole, or any portion, either in length or width, of the streets, avenues, lanes, alleys, courts, or places of any such municipality graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, sewered or resewered, supplied or resupplied with drains for storm-water or other purposes, and to order sidewalks, parkways, manholes, catch basins, culverts, cesspools, gutters, tunnels, curbing, and cross-walks to be constructed therein, or to order breakwaters, levees, or walls of rock, or other material, to protect the same from overflow or injury, and to order any other work to be done which shall be necessary to complete the whole or any portion of said streets, avenues, sidewalks, lanes, alleys, courts, or places, and it may order any of the said work to be improved, and also to order a sewer or sewers, with outlets, for drainage or sanitary purposes, in, over, or through any right of way granted or obtained for such purpose; and to provide for the maintenance of any such work.

§ 3. Before ordering any work done or improvement made, which is authorized by section 2 of this act, the legislative body shall pass a resolution referring the proposed work to the city engineer, if there be one, and, if not, to some civil engineer employed by them for the purpose and named in the resolution, and instructing him to make to the legislative body a report in writing, containing his recommendations as to the best method of doing said work or of making said improvement, to which report shall be attached the exhibits hereinafter referred to.

§ 4. Thereafter, the said engineer shall file with the clerk of the municipality the report called for by section 3 above, and annex thereto the following exhibits, to wit:

1. A description of the work to be done; said work may include one or more streets in the same proceeding;

2. A description of the exterior boundaries of the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof;

3. Plans, profiles, cross-sections and specifications of the work required in order to accomplish said improvement;

4. An estimate of the expense of said improvements, deducting therefrom the estimated cost of so much, if any, of said improvements as may be by law required to be done by railroads having tracks upon the streets affected;

5. A map showing the district above referred to, and also the subdivisions of the property within said district, as ascertained by said engineer, each of which subdivisions shall be given upon said map a separate number in red ink;

6. A list referring to the said subdivisions upon said map by the respective red ink numbers thereof, and showing the names of the owners, if known, otherwise designating them as unknown, and the valuations of said respective subdivisions, as the same appear upon the last assessment-roll of said municipality, if they so appear, otherwise as estimated by said engineer,

also the dimensions, areas, and his estimates of the benefits which the respective parcels will receive from said improvement;

7. An estimate of all incidental expenses likely to be incurred in connection with the work, such as clerical, engineering, inspection, printing and advertising.

§ 5. After the report of the engineer provided for in the next preceding section has been filed with the clerk of the municipality, the legislative body of said municipality shall consider the same and have the power, by resolution, to adopt the same as filed by said engineer, or as modified by the legislative body, and levy the assessment accordingly, but the same shall not constitute a lien until all parties interested have had an opportunity to be heard as hereinafter provided; in the same resolution the legislative body shall set forth the following:

1st. The rate of interest to be charged upon deferred payments;

2d. The time to be allowed upon deferred payments;

3d. The rate of interest to be allowed upon bonds issued to cover deferred payments.

4th. The time for which bonds issued to cover deferred payments are to run;

5th. The day and hour when and where any and all persons may appear before the legislative body and show cause, if any they have, why said improvement provided for in said resolution should not be carried out in accordance therewith; said time to be not less than thirty nor more than sixty days from the date of passage of said resolution;

6th. A description of the exterior boundaries of the district declared by the legislative body to be benefited by the proposed improvement and assessed to pay the costs and expenses thereof.

The rate of interest above referred to shall not exceed seven per cent, and in the same resolution the legislative body shall provide, if they so determine, that the work covered by said resolution shall include maintenance thereof for a stated number of years to be fixed by said resolution.

§ 6. After the passage of the resolution mentioned in section 5 hereof there shall be conspicuously posted in three of the most public places within the municipality, and also along the street frontages of all the real property within the district, at not more than one hundred feet in distance apart, notices of the hearing provided for in section 5; said notices shall be headed, "Notice of Local Improvement," in letters of not less than one inch in length, and shall in legible characters state the fact of the passage of the resolution mentioned in section 5, and briefly describe the work of improvement proposed, and refer to said resolution for further particulars; said notice shall also state the date, hour and place for which the said hearing has been set, and shall notify all parties interested in any real estate within the limits of said district then and there to show cause, if any they have, why the said improvements proposed in said resolution should not be carried out in accordance therewith; said notice shall also contain a description of the district covered by the resolution by the exterior boundaries thereof, said description to be in bold-faced type; said notices must be posted at least twenty days before the time set for the hearing, and must be published twice in some newspaper of general circulation, published within the municipal corporation in which the improvements are to be made, at least ten days before the date of hearing.

§ 7. At the time named in the notice hereinbefore provided for for said hearing there shall be filed with the legislative body an affidavit that the

notice has been posted as hereinbefore provided for, and an affidavit of the printer or publisher of the newspaper in which said notice has been published that the same has been published as hereinbefore provided for, and the legislative body, before proceeding with said hearing, shall have entered upon the minutes of the meeting an order reciting that notice of said hearing has been posted and published according to law, and such recitals shall be conclusive evidence of the facts therein recited, and the legislative body shall thereupon proceed with the hearing of any objections which shall have been made in writing and filed with the clerk of the municipality not later than the hour for hearing named in said notice, and no other objections shall be considered. Said hearing may be continued from time to time by the legislative body, and all parties interested shall be deemed to have notice of said continuances. All objections must be in writing, must contain a description of the property in which the objector is interested, and set forth the nature of his title thereto or interest therein, and must state the objector's grounds of opposition, and must be signed and verified by the objector himself, or his attorney in fact, and objections which do not comply with these requirements shall not be considered by the said legislative body.

§ 8. At the close of the hearing provided for in the preceding section, the legislative body shall pass a resolution setting aside, modifying, or confirming the resolution provided for in section 5 hereof, and where the same is confirmed or modified, the lien of the assessment provided for therein shall immediately become attached to the respective parcels of land in accordance with said confirmed or modified resolution.

§ 9. Any action to contest an assessment levied by the legislative body of any municipality under the terms of this act must be commenced within thirty days after the entry upon the minutes of such legislative body of the resolution provided for in the preceding section hereof; and any appeal from a final judgment in such an action must be perfected within thirty days after the entry of such judgment.

§ 10. After the expiration of thirty days from the passage of the resolution provided for in section 8 hereof, the clerk of the municipality shall transmit to the tax collector of the municipality the map and list provided for in subdivisions 5 and 6, respectively, of section 4 hereof, and any modification made by the legislative body therein; provided, however, if any actions have been brought within thirty days after the passage of the resolution referred to in section 8, such transmission shall be postponed until such actions have been finally determined.

§ 11. Upon the receipt of the map and list referred to in the last preceding section, the tax collector of the municipality shall record the same in a substantial book to be kept for that purpose in his office. Said book shall also be ruled with appropriate columns, in which the tax collector shall extend the amounts of all installments of principal and interest and deferred payments, and each of said columns shall be provided with a space in which he shall make record of the fact and date of all payments received by him; and there shall also be a column in which shall be entered a reference by volume and page to the respective agreements under which said deferred payments are made.

§ 12. The tax collector of the municipality shall thereupon fix a day, not less than thirty nor more than forty days from the date of the receipt by him of the map and list transmitted to him under the provisions of section 10 hereof, which day shall be the last day for cash payments; and also

shall fix a day for the sale of the various parcels of land within said district, which said day shall be not less than forty nor more than sixty days from the receipt by him of the map and list transmitted to him under the provisions of section 10 hereof; notice thereof shall be given in conformity with the general laws of the state of California providing for notice of sale of real estate upon execution, and shall be posted and published in the same manner as such notices; provided, however, that the descriptions of the various parcels need not be set out at length, but only by the respective numbers of the same, as the same appear upon the assessment and diagram, which shall be properly referred to in said notice; which shall be in one writing, containing all of said descriptions.

§ 13. At the time and place fixed for the sale of said property by the terms of the notice referred to in the last section, the tax collector shall sell the respective parcels of land within said district, the assessments against which have not been paid or bonded against as hereinafter provided, or so much of each parcel as shall be necessary to realize the amount assessed against such parcel and its proportion of the expenses of sale, in the order of their numbers upon the map provided for in subdivision 5 of section 4 hereof, at which sale the municipality may be a purchaser; provided, however, if at or before the time fixed in the notice of sale the owner of any parcel shall file with the tax collector a written agreement, waiving all objections, of whatsoever kind or nature, against the assessment and all proceedings with reference to the same, and undertaking to pay the assessment on his parcel in yearly installments not to exceed ten in number, the first of which shall be paid at the time said agreement is filed, and the others annually thereafter, one each year, at the time when the first installment of municipal taxes within said municipality is payable, with interest on all deferred payments at the rate of —— per cent per annum, being the same rate fixed by the resolution provided for in section 5 above for deferred payments, payable at the same time as the installments of principal, then, and in that event, the tax collector shall mark upon the record of the assessment, opposite the respective descriptions or numbers of such parcels, memoranda to the effect that time has been given; said waivers and undertakings shall be taken upon printed forms provided by the tax collector, bound in a substantial book and kept among the records of his office; said agreements shall contain a provision to the effect that in case of default in payment of any installment of principal provided for therein, or interest accrued on deferred payments, at the time called for by said agreements, then, in that event, the entire remaining unpaid installments shall become immediately due and payable, and the tax collector shall then forthwith, upon twelve days' written notice mailed to the last known address of the party, sell the property covered by the delinquent payment to realize the entire unpaid balance of said installments, with accrued interests and costs of sale; provided, the same have not been paid before the expiration of said twelve days. At such sale the municipality may be a bidder; said agreement shall provide that the entire unpaid balance may be paid at any time before maturity, together with interest on all deferred payments, until the date of maturity of the installment of principal next falling due.

§ 14. The tax collector shall issue for each sale an original and duplicate certificate of sale, referring to the proceedings, describing the parcels sold, and containing the name of the purchaser; the originals he shall deliver to the purchaser, and the duplicates he shall keep on file in his office in the form of stubs in a certificate-book.

§ 15. If the property sold as provided in the above proceedings be not redeemed within one year after the sale, the tax collector shall then issue to the party named in the original certificate, or his assignee, a deed of the property described in said certificate, which said deeds shall refer, in general terms, to the proceedings under which the same is issued, and shall contain a description of the property, following the description in the certificate; the grantee of such deed is, immediately upon receipt thereof, entitled to possession of the property described therein.

§ 16. At any time before the expiration of the year above provided for, in which redemption may be made, any property sold under the provisions of the preceding sections may be redeemed by the payment to the tax collector of the amount for which the property was sold, with an additional penalty of twenty-five per cent of the amount for which the same was sold; all redemption money shall be paid by the tax collector to the persons holding the respective original certificates of sale, upon their delivering up the same, and receipting for the amount received from the tax collector therefor.

§ 17. The said funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said municipality, who shall enter the same in a special fund designated by reference to the number of the proceeding, and shall be paid out only for purposes provided for in this act.

§ 18. After all sales above provided for have been made, the tax collector shall report to the legislative body of the municipality, the amount of cash collections and the amount of installment agreements taken; at any time thereafter the legislative body may order bonds issued against the said special local improvement fund, in such denominations and on such terms, not to exceed ten years, and at such rate of interest, not to exceed seven per cent per annum, as they shall have designated in said proceedings, the aggregate of such bonds not to exceed the amount of the installment agreements taken, as above set forth; the form of such bonds shall be substantially as follows:

"LOCAL IMPROVEMENT BOND.

"District No. ——.

"$——. No. ——.

"Under and by virtue of an act of the legislature of the state of California" (title of this act) "the" (insert the legal title of the municipality) "out of the fund hereinafter referred to, will pay to the bearer the sum of $—— United States gold coin of the same weight and fineness as that now issued from the mints of the United States of America with interest thereon, in like gold coin, at the rate of —— per cent per annum, all as hereinafter specified, and at the office of the treasurer of said municipality.

"This bond is payable exclusively from street improvement fund number ——" (here insert designation of special fund, as same is identified on the books of the treasurer of the municipality, as provided in section 19 of this act), "and neither the municipality nor any officer thereof shall be holden for payment otherwise of its principal or interest; and installments of principal and interest accruing hereon shall be payable out of any moneys in said fund at the date of their maturity, in order of presentation, and shall be secured by all agreements and liens provided for by this act and arising

out of the improvement to which said fund relates. The term of this bond is —— years from its date, and, at the expiration of said time, the whole sum then unpaid shall be due and payable; but on the second day of January of each year after its date, an even annual proportion of its whole amount is due and payable, upon the presentation of the coupon therefor, until the whole is paid, with all accrued interest, at the rate of —— per cent per annum. The interest is payable semi-annually, to wit: On the second days of January and July in each year hereafter, upon the presentation of the coupons therefor, the first of which is for the interest from date to the next second day of ——, and thereafter the interest coupons are for semi-annual interest, except the last, which is for interest from the semi-annual payment next preceding and to the date of the final maturity of this bond. Should default be made in the annual payment upon the principal, or in any payment of interest, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have all liens and agreements, which are security for said fund and are then enforceable, immediately enforced in payment thereof. The principal hereof may be paid, at the option of said municipality, at any time before maturity. Notice of such redemption must be published by the treasurer of said municipality once in some newspaper of general circulation, published in said municipality, or at the county seat of the county in which the same is located, and, at the expiration of one month from said publication, interest on all principal sums covered by such notice shall cease.

"At said —— of —— the —— day of —— in the year one thousand —— hundred and ——."

Insert title of (presiding officer of the legislative body.)

"Treasurer of the" (name of municipality).

Said bonds shall be signed by the presiding officer of the legislative body of the municipality and countersigned by the treasurer of said municipality, and the seal of the municipality shall be affixed thereto. Said coupons shall be signed by the treasurer of the municipality, and his signature thereto may be by lithograph.

Said bonds shall then be sold at not less than par to the highest bidder, for cash in United States gold coin; the proceeds shall be paid into the said special local improvement fund in the treasurer's hands.

§ 19. At any time after the funds for the work, or any part of the work, are actually in the hands of the treasurer, the legislative body may let the contract, or contracts, for such work, or the respective parts thereof; all contracts shall be let to the lowest responsible bidder, after notice published in some newspaper of general circulation published within the municipality, for two insertions, a week apart; or if there be no such newspaper, then by such posting as the legislative body may provide.

Every bid shall be accompanied by the certified check amounting to ten per cent of the bid, payable to the order of the presiding officer of the legislative body of the municipality, and the same shall be forfeited to the municipality in case the bidder depositing the same do not, within ten days after written notice that the contract has been awarded to him, enter into a contract with the municipality for the work, the faithful performance of which shall be secured by an undertaking in such penal sum as the legislative body shall require, and with sureties satisfactory to said body; when such contract and bond have been entered into, said check shall be returned to the successful bidder; the unsuccessful bidders shall receive their checks upon notice of rejection of their bids; and the legislative body may require,

and, if so, it must be stated in the original resolution and petition and in the notice for bids, that the contractor to whom the work is awarded shall furnish the municipality with a bond in such sum and with such responsible surety corporation (legally qualified to carry on business in the state of California), as guarantor, as shall be approved by said legislative body, conditioned that the said contractor shall maintain free from all defects, except such as may result from ordinary wear and tear, the work contracted for and performed for such period as may be designated by said legislative body.

The contract must provide that the work be done, and the work must be done, strictly in accordance with the plans and specifications provided for in section 4 of this act, as modified by the resolution provided for in section 5 of this act; the contract must contain provisions making it comply with the terms of all statutes of the state of California in force at the time of the making of the contract, with reference to employment, hours and wages of labor.

The work must be done under the supervision of the superintendent of streets of the municipality, or such deputy or deputies as the legislative body shall appoint for the purpose.

No work shall be paid for until it has been accepted by the legislative body. Whenever the contractor desires the work or part thereof to be accepted he must make written application to that effect to the legislative body of the municipality. Upon the filing of such application for acceptance, the clerk of the municipality shall give at least five days' notice by publication within the municipality or by posting upon the premises affected, as the legislative body shall determine, that at a certain time to be named in said notice the legislative body of the municipality will hear and consider any objections to the acceptance of the work or part of the work for the acceptance of which said contractor has made such application, and only after such hearing shall any work be accepted. If upon such hearing objections to the acceptance are made and held by the legislative body to be good, the legislative body must require the contractor to take such steps as will remove such objections, and in the event of his failure to do so within such time as the legislative body shall prescribe, the legislative body may relet such portion of the work and charge the contractor the cost thereof together with all expenses incident to said reletting, and retain the same out of any moneys due or to become due to him under the contract, and also hold him and his sureties responsible therefor upon his bond.

The work must be commenced and completed within such time as the legislative body shall prescribe. If the contractor abandon the work, or fail to proceed with the same as rapidly as required by his contract, the legislative body may relet the work and pay the cost of the same out of any funds due or to grow due the contractor, and also any expenses incidental to the reletting, and also hold him and his sureties responsible for the same upon his bond, and also for any damages resulting from such abandonment.

§ 20. In case the first assessment for any local improvement prove insufficient, a second may be made in the same manner as nearly as may be, except that no protest shall be entertained upon subject matter already decided in the first hearing, and so on until sufficient money shall have been realized to pay for such local improvement.

§ 21. If at any time an assessment for any local improvement shall realize a larger sum than is necessary for such improvement, the excess shall

be refunded upon warrant on the treasurer, authorized by the legislative body, pro rata, to the parties by whom it was paid; and, in the case of installment assessments, shall be credited on the unpaid installments, beginning with the one due at the latest date.

§ 22. All special assessments levied under this act shall, from the date of confirmation as provided in section 8 hereof, be a lien upon the real estate upon which they are imposed, paramount to all other liens, except prior assessments and general taxes, and such lien shall continue until such special assessments are paid; and all parties shall have constructive notice of such lien from the date of entry of the resolution referred to in section 8 above.

§ 23. Whenever the majority of frontage between any two consecutive crossings upon any of the public ways mentioned in section 1 of this act, has been improved, the legislative body may compel the remainder of said frontage between said crossings to be similarly improved without other proceedings than those provided for in this section as follows, to wit: The legislative body shall pass a resolution ordering said work to be done, briefly describing the work and the property in front of which the work is to be done, and fixing a time when objections to the doing of said work will be heard by said legislative body, which said time shall be not less than two weeks nor more than thirty days from the date of the passage of the resolution; at least ten days before the time named in said resolution for said hearing the clerk of the municipality shall mail a copy of said resolution to the person or persons to whom the property in front of which the said work is to be done is assessed upon the last preceding assessment-roll of such municipality, at their addresses if known, otherwise addressed to the care of the United States postoffice in the municipality, shall personally serve upon the person or persons in possession of the premises, if the same be occupied, and shall post a copy of the same in a conspicuous place upon the said premises, and the certificate of said clerk to the effect that said mailing, posting and service has been done shall be filed with the legislative body and entered upon their minutes, and said entry shall constitute conclusive evidence of the facts stated in said certificate; at the time named in said resolution said legislative body shall meet and consider any objections which may be made to the doing of said work; if there are no objections or if the legislative body overrule the same, the legislative body shall then pass a resolution ordering said work to be done; if within ten days after the passage of the last named resolution satisfactory evidence be not produced to the legislative body that the said work is to be immediately done by private contract the legislative body may advertise for bids for such work by such publication or posting as they shall deem necessary and let the work to the lowest responsible bidder, and pay for the same out of the general fund or any other fund available for the purpose; the entire cost of such work together with the expenses incidental to the proceedings therefor shall be charged against the property in front of which the same has been done; the clerk of the municipality shall immediately upon the completion and acceptance of the work file an itemized statement of said charge with the recorder of the county in which the municipality is located, and thereupon the said charge shall become a lien upon the property affected, which said lien shall relate back to the date of the passage of the original resolution first above mentioned and shall be continued upon such property until the same is paid in full with interest at seven per cent from the date of the record of such statement; and the municipality shall have power to

enforce said lien by foreclosure suit and sell said property for the satisfaction thereof.

§ 24. This act shall be known as "The Local Improvement Act of 1901" and shall take effect and be in force upon its passage and approval.

§ 25. This act shall in no wise affect an act entitled "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March eighteenth, eighteen hundred and eighty-five, or amendments thereto, or an act entitled "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of said bonds," approved February twenty-seventh, eighteen hundred and ninety-three; or any of said acts; but is intended to and does provide an alternate system of proceedings for public improvements, and it shall be within the discretionary power of the legislative body of any municipality to proceed in making such improvements, either under the provisions of this act, or under the provisions of the other said acts, but when any proceedings are commenced under this act the provisions of this act, and such amendments thereto as may hereafter be adopted, and no other, shall thereafter apply to all such proceedings; but any provision contained in said or any other acts in conflict with provisions hereof shall be void as to and of no effect upon proceedings commenced under the provisions of this act.

5. Change of Grade Act of 1909.

An act to provide for changing or modifying the grade of public streets, lanes, alleys, courts, or other places, within municipalities.

[Approved April 21, 1909. Stats. 1909, p. 1018.]

Power of City Council to Change Grade.

§ 1. The city council of any city is hereby empowered to change or modify the grade of public streets, lanes, alleys, courts, or other places therein, in the manner hereinafter provided.

Resolution of Intention. Publication of Notice. Posting of Notice.

§ 2. Before any change or modification of grade is ordered, the city council shall pass an ordinance or resolution of intention to order such change or modification of grade. Said ordinance or resolution of intention shall state the name of, or otherwise designate the public street, lane, alley, court or other place the grade of which, or any portion thereof, is proposed to be changed or modified, and shall set forth the change or modification of grade proposed to be made. One or more public streets, alleys, lanes, courts, or other places, or portions thereof, may be included in the same ordinance or resolution of intention. Said ordinance or resolution of intention shall be posted conspicuously for two days on or near the chamber door of said city council, and published by two insertions in a daily or weekly newspaper published and circulated in said city, and designated by said council for that purpose. If no such newspaper is published and circulated in said city, such ordinance or resolution of intention shall be posted for two days on or near the council chamber door, and in two other public places in said city. The street superintendent shall thereupon cause to be conspicuously posted along all public streets, lanes, alleys, courts, or other places, or portions thereof designated in the said ordinance or resolution of intention, where such change or modification of grade is proposed to be

made, at not more than one hundred feet in distance apart, notices, but not less than three in all, of the passage of said ordinance or resolution of intention. Said notice shall be headed "Notice of Change of Grade," in letters of not less than one inch in length, and shall in legible characters state the fact of the passage of the said ordinance or resolution of intention, its date, the name or other designation of the public street, lane, alley, court, or other place, or portion thereof, the grade of which is proposed to be changed or modified, and shall refer to the ordinance or resolution of intention for further particulars. He shall also cause a notice similar in substance to be published for six days in a daily newspaper published and circulated in said city, and designated by said city council for that purpose, or in cities where there is no daily newspaper, by two insertions in a weekly newspaper so published, circulated and designated. In case there is no daily or weekly newspaper published in said city, said notice shall be posted for six days on or near the chamber door of said council, and in two other public places in said city.

Protest of Owners. Findings of Council. Intersecting Streets; Protests.

§ 3. Any person or persons owning any real property fronting upon any public street, lane, alley, court or other place, or portion thereof, where such change or modification of grade is proposed to be made, may, within thirty days after the first publication of the notice of the passage of the ordinance or resolution of intention, or within thirty days after the first posting thereof, where no publication thereof is made, as hereinbefore provided, file a written protest with the clerk of the city council against such proposed change or modification of grade. Every such protest must contain a description of the property owned by each signer thereof, sufficient to identify the same, and if signed by more than one person, must be accompanied by the affidavit of one of the signers that each signature thereto is the genuine signature of the person whose name purports to be thereto subscribed; and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements shall not be considered by said city council. The clerk of the city council shall indorse on every such protest the date of its reception by him; and at the next regular meeting of the city council after the expiration of the time for filing protests, shall present to said city council all protests so filed with him. If the city council finds that such protests are signed by the owners of a majority of the frontage of the property fronting on the public street, lane, alley, court, or other place, or portion thereof where such change or modification of grade is proposed to be made, all further proceedings under said ordinance or resolution of intention shall be stayed and barred for six months from and after the filing of such majority protests, except as hereinafter provided, unless the owners of a majority of such frontage shall in the mean time petition the same change or modification of grade to be made; but a new ordinance or resolution of intention to make a different change or modification of grade of such public street, lane, alley, court, or portion thereof, may be passed at any time.

In the event that the ordinance or resolution of intention designates any public street, lane, alley, court or other place, or portion thereof, the grade of which is proposed to be changed or modified, and there be included in said ordinance or resolution of intention any other public street, lane, alley, court or other place, or portion thereof, intersecting therewith or terminating therein, the grade of which is also proposed to be changed or modified, the change or modification of grade of such public street, lane, alley, court or

other place, and of such other public street, lane, alley, court or other place or portion thereof, so intersecting or terminating, shall not be stayed or barred by any protests, made and filed as hereinbefore provided, unless such protest be signed by the owners of a majority of the total frontage of the property fronting on all such public streets, lanes, alleys, courts or other places, or portions thereof, where such change or modification of grade is proposed to be made. If the city council finds that such protests are not signed by the owners of a majority of the property fronting on the public street, lane, alley, court or other place, or portion thereof, where such change or modification of grade is proposed to be made, or if the proposed change or modification of grade extends for a distance of not more than one block, and the grade of such public street, lane, alley, court, or other place, for at least one block thereof immediately adjacent to such block where such change or modification of grade is proposed to be made, on each side thereof, has already been established, or if the proposed change or modification of grade extends for a distance of not more than one block, at the end of a public street, lane, alley, court or place, and the grade thereof for at least one block thereof immediately adjacent to such block has already been established, the city council shall thereupon fix a time for hearing such protests not less than ten days after the meeting of the council at which such time is so fixed and shall cause notice of the time and place of such hearing to be published for two days in a daily newspaper published and circulated in said city, or by one insertion in a weekly newspaper so published and circulated; and if no daily or weekly newspaper be published and circulated in said city, then said notice shall be posted for two days on or near the council chamber door, and in two other public places in said city; and such publication or posting shall be completed at least five days before such hearing. The city council shall hear said protests at the time and place appointed, or at any time to which the hearing thereof may be continued, and pass upon the same, and its decision thereon shall be final and conclusive. If such protests are sustained, no further proceedings shall be had under said ordinance or resolution of intention, but a new ordinance or resolution of intention to make the same, or a different change or modification of grade may be passed at any time. If such protests are denied, the proceedings shall continue as if such protests had not been filed.

Jurisdiction, When Acquired.

§ 4. If no protests are filed within the time hereinbefore provided, or if protests are filed, and after hearing are denied, as hereinbefore provided, the city council shall acquire jurisdiction to order the change or modification of grade described in the ordinance or resolution of intention to be made. Having acquired such jurisdiction, the city council shall by ordinance or resolution, order the change or modification of grade to be made as proposed by and described in the ordinance or resolution of intention. Said ordinance or resolution ordering the change or modification of grade shall be published by two insertions in a daily, or by one insertion in a weekly newspaper published and circulated in said city; or, if no such newspaper be published and circulated therein, the same shall be posted for two days on or near the council chamber door, and in two other public places in said city.

Who Deemed to be Owner.

§ 5. Except as otherwise hereinafter provided the person owning the fee, or the person in whom on the day any protest or petition is filed the legal title to real property appears, by deeds duly recorded in the county

recorder's office of the county in which said city is situated, shall be deemed to be the owner thereof for the purposes of this act; provided, however, that any person in possession of real property as the executor, administrator, trustee, guardian, or other legal representative of the owner, or any person in possession of real property under written contract of purchase duly recorded, shall be deemed to be the owner thereof for the purposes of this act. In the case of property held by tenancy in common, if any cotenant sign a protest under this act, only the proportionate share of the frontage thereof represented by his interest therein shall be counted in determining the amount of frontage represented by such protest. In the event that the change or modification of grade proposed by the ordinance or resolution of intention is only on one side of any public street, lane, alley, court or other place, or portion thereof, only the owners of the real property fronting on the side of such public street, lane, alley, court or other place, or portion thereof where such change or modification of grade is proposed to be made, shall be entitled to make or file a protest under the provisions of this act. If the grade of any public street, lane, alley, court, or other place, or portion thereof, has been heretofore, or shall be hereafter changed or modified, nothing in this act contained shall be construed to prevent any subsequent change or changes, modification or modifications of grade of any such public street, lane, alley, court or other place, or portion thereof.

Proof of Publication and Posting.

§ 5a. Proof of publication of any notice required by this act shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting. [Am. 1911.]

Meanings of Certain Words.

§ 6. The following words and phrases, where used in this act, shall have the following meanings:

1. The terms "municipality" and "city" include every incorporated city, city and county, or other corporation organized for municipal purposes.

2. The terms "city council" and "council" include any body or board in which by law is vested the legislative power of any city.

3. The terms "clerk" and "city clerk" shall include any person or officer who shall be clerk of the city council.

4. The term "superintendent of streets" includes any officer or board whose duty it is by law to have the care or charge of streets, or the improvement thereof, in any city. In any city where there is no superintendent of streets, or no such board, the legislative body is hereby authorized to designate some other officer to perform the duties imposed by this act on the superintendent of streets, and all the provisions hereof applicable to the superintendent of streets shall apply to the officer so designated.

Certain Acts not Affected. Intention of Act. Name of Act.

§ 7. This act shall in no wise affect an act entitled "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885,

or amendments thereto; or an act entitled "An act to amend an act 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, by adding thereto certain new and additional sections, to provide the mode of carrying into effect certain provisions of said act relative to changing grades," approved March 31, 1891, or amendments thereto, or any other acts on the same subject; but is intended to and does provide an alternate system of proceedings for changing or modifying the grades of public streets, lanes, alleys, courts, or other places in municipalities; and it shall be within the discretion of the city council of any municipality to proceed in making any such change or modification of grade, either under the provisions of this act, or under the provisions of said acts hereinbefore mentioned, or amendments thereto; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereto as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts, or in any acts in conflict with the provisions hereof, shall be void and of no effect as to the proceedings commenced under the provisions of this act. The election of the city council to proceed under the provisions of this act shall be expressed in its ordinance of intention to order any change or modification of grade. The provisions of this act shall be liberally construed to promote the objects thereof. This act may be designated and referred to as the "Change of Grade Act of 1909."

§ 8. This act shall take effect immediately.

6. Street Improvement Act of 1909.

An act to provide for the improvement of public streets, lanes, alleys, courts and places in municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby.

[Approved April 21, 1909. Stats. 1909, p. 1042.]

Street Improvements. Damage to Private Property.

§ 1. Whenever the public interest or convenience may require, the legislative body of any city, after having by ordinance or resolution established or changed or modified the grade of any public street, lane, alley, court or place in said city, or any portion thereof, is hereby empowered, in any case where in the opinion of said legislative body any damage to private property would result from the improvement thereof, to order the whole, or any part, either in length or width, of such public street, lane, alley, court or place, to be improved to conform to such official grade by grading or regrading, paving or repaving, planking or replanking, macadamizing or remacadamizing, piling or repiling, capping or recapping, graveling or regraveling, oiling or reoiling, sewering or resewering, sidewalking or residewalking, curbing or recurbing, or guttering or reguttering, or by the building of storm water ditches or channels or breakwaters, levees, walls of rock or of other material to protect the same from overflow or injury, or by constructing manholes, culverts, bridges, cesspools, tunnels or cross-walks, or by the doing of any other work which shall be necessary to complete the whole or any portion of said public street, lane, alley, court or place, under the proceedings hereinbefore provided, and in accordance with plans and

specifications prepared by the city engineer of said city, and approved by the legislative body thereof.

Resolution of Intention.

§ 2. Before ordering any improvement described in section 1 hereof, the said legislative body shall pass an ordinance or resolution declaring its intention so to do, and that in its opinion damage to private property would result from such improvement, describing the proposed improvement, fixing a time and place for the hearing of protests in relation thereto by said legislative body, which time shall be not less than twenty nor more than thirty days from the date of the passage of said ordinance or resolution of intention, and specifying the exterior boundaries of the district of land to be benefited by said improvement and to be specially assessed to pay the costs and expenses therof, and the damages caused by said improvement, which shall be known as the assessment district. Said legislative body may include in one improvement the whole or any portion of one or more streets, lanes, alleys, courts or other public places, and any or all of the different kinds of work mentioned in section 1 hereof, and may exclude therefrom any of said work already done to the official grade.

Publication of Resolution. Posting of Notices. Publication of Notice.

§ 3. Said ordinance or resolution of intention shall be conspicuously posted for two days on or near the chamber door of said legislative body, and published by two insertions in a daily or weekly newspaper published and circulated in said city, and designated by said legislative body for said purpose. If no such newspaper be so published and circulated in said city, such posting of said ordinance or resolution of intention shall be sufficient. The superintendent of streets shall thereupon cause to be conspicuously posted along all streets and parts of streets within the assessment district described in the ordinance or resolution of intention, not more than one hundred feet apart, notices (not less than three in all) of the passage of said ordinance or resolution. Said notices shall be headed "Notice of Street Work" in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said ordinance or resolution of intention and the time and place fixed for the hearing of protests, and notify all persons interested to appear at said time and place with their objections to said improvement, if any they have, and briefly describe the proposed improvement, and refer to the ordinance or resolution of intention for further particulars. He shall also cause a notice of similar substance to be published for a period of five days in a daily newspaper published and circulated in said city, or if there is no such daily newspaper, then by two successive insertions in a weekly newspaper so published and circulated. If no such newspaper be so published and circulated in said city, such notice shall be also posted on or near the chamber door of the legislative body of said city, and in two other public places in said city. Such posting and publication must be completed at least fifteen days before the day set for the hearing of protests.

Protests, must Contain What. Affidavits of Posting. Findings of Council. Hearing of Protests.

§ 4. At or before the time fixed for the hearing, any person interested, objecting to the proposed improvement or to the extent of the assessment district described in the ordinance or resolution of intention, may file a written protest with the clerk of said legislative body. Every protest must contain a description of the property in which each signer thereof is in-

terested and set forth the nature of his interest therein and must be accompanied by the affidavit of one of the signers thereof that each signature thereto is the genuine signature of the person whose name is thereto subscribed, and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements shall not be considered by said legislative body. The clerk shall indorse on every such protest the date of its reception by him, and at the time fixed for the hearing, or at any other time to which the hearing may be adjourned, he shall present to said legislative body all protests so filed with him. Before the hearing of any protests there shall be filed with such legislative body affidavits showing that the said notices have been posted and published as hereinbefore required, and the said legislative body shall thereupon cause to be entered in its minutes an order reciting that notice of said hearing has been posted and published as required by law, and such order shall be prima facie evidence of the truth of the facts therein recited.

If such protests are against the said improvement, and the legislative body finds that the same are signed by the owners of a majority of the frontage of the property fronting on the streets or parts of streets within the assessment district, all further proceedings under said ordinance or resolution of intention shall be barred, except as hereinafter provided, for six months after the presentation of such protests to such legislative body, and no new ordinance or resolution of intention for the same improvement shall be passed within said six months, unless the owners of a majority of the frontage of the property fronting on the streets or parts of streets within said assessment district shall in the meantime petition that said improvement be made. If such protests are against the improvement, and the legislative body finds that they are not signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district, or if such protests are only against the extent of the assessment district, or if the proposed improvement is the construction of sewers, manholes, culverts, cesspools, cross-walks, gutters, curbs or sidewalks, or extends for a distance of not more than one block of any street and at least one block of such street immediately adjacent thereto on both ends of the block proposed to be improved has already been improved, or extends for a distance of not more than one block at the end of a street and at least one block immediately adjacent thereto has already been improved, the legislative body shall hear said protests at said meeting, or at any time to which the hearing thereof may be continued, and pass upon the same, and its decision shall be final and conclusive. If such protests are sustained, no further proceedings shall be had under said ordinance or resolution of intention, but a new ordinance or resolution of intention for the same improvement may be passed at any time. If such protests are denied, the proceedings shall continue as if such protests had not been made.

Jurisdiction, When Acquired.

§ 5. If no protests are filed at or before the time fixed for the hearing thereof by the ordinance or resolution of intention, or if protests are filed, and after hearing are denied, as above provided, the legislative body shall have jurisdiction to order the improvement described in the ordinance or resolution of intention. Having acquired such jurisdiction, it shall by ordinance or resolution order such improvement to be made, and refer the same to the commission hereinafter provided for, to estimate the damages

caused thereby, and report an assessment of said damages, and of all costs and expenses of the improvement, on the property benefited thereby. Said ordinance or resolution shall describe the improvement in the same manner as the ordinance or resolution of intention, and shall be published by two insertions in a daily or weekly newspaper published and circulated in said city, or if no such newspaper be so published and circulated, said ordinance or resolution shall be posted on or near the chamber door of the legislative body, and at two other public places in said city.

Commission to Estimate Damages.

§ 6. In any city having a board of public works created by its charter or by law, such board, and in other cities the mayor, city engineer or surveyor and superintendent of streets, or if all of such officers last mentioned do not exist in cities having no board of public works, any three competent and disinterested persons appointed by said legislative body, shall act as a commission to estimate the damages caused by said proposed improvement and to assess the same, and all costs and expenses of said proposed improvement upon the property benefited thereby. Such commissioners, if they are appointed by said legislative body as aforesaid, shall be sworn to make the assessment of benefits and damages faithfully, impartially and to the best of their ability. Said commission shall have power to subpoena witnesses to appear before it to be examined under oath, which any of said commissioners may administer.

Hearing Petitions for Damages.

§ 7. Upon the passage of the final ordinance or resolution referred to in section 5 hereof, said commission shall appoint a time and place for the hearing of petitions for damages caused by said improvement, and shall cause notice of such time and place to be published for at least five days in a daily newspaper, or three times in a weekly newspaper, published in said city, or if no such newspaper is so published and circulated, then by posting for two days in three public places in said city. The time set for hearing such petition shall be not less than thirty days from the first publication or posting of such notice. Before said hearing said commission shall view the location of the proposed improvement, and the property affected thereby. Said hearing may be continued from time to time by said commission.

Claims for Damages.

§ 8. At or before the time set for hearing of petitions for damages any person owning property, and claiming that the same will be damaged by said proposed improvement, shall file with the city clerk, who shall transmit the same to the commission, a petition showing the fact of such ownership, the description of the property claimed to be damaged, its market value, and the amount of damages which it is claimed such property will sustain by the proposed improvement, and the postoffice address of such petitioner, or his agent. Every such petition shall be verified by the oath of the petitioner or his agent. After considering the petitions filed as hereinbefore provided, and after hearing the petitioners who may appear, and after viewing the location of the proposed improvement and the property affected thereby, said commission shall proceed to determine the amount of damages, if any, which will be sustained by each such petitioner because of the proposed improvement. No damages or compensation whatsoever shall be allowed or awarded to the owner of any property affected by said improvement unless a petition therefor be filed as provided in this section, and any

property owner who fails to file a petition for damages as hereinbefore provided, shall be deemed to have waived any and all claims for damages caused by said improvement.

Proposals for Doing Work. Bids. Award of Contract. Supervision of Work.

§ 9. Before the awarding of any contract by the legislative body for doing any work authorized by this act, said legislative body shall cause notice, with specifications, to be posted conspicuously for five days on or near the chamber door of said legislative body, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work inviting said proposal, and referring to the specifications posted or on file, to be published for two days in a daily, or weekly newspaper published and circulated in said city, designated by said legislative body for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. Every bid shall be delivered to the clerk of the legislative body and shall be accompanied by a check certified by a responsible bank, amounting to ten per cent of the amount of the bid, payable to the order of the said clerk, or by a bond for the said amount, and so payable, signed by the bidder and by two sureties who shall justify before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions, and said amount shall be forfeited to the city in case the bidder depositing the same does not, within ten days after written notice that the contract has been awarded to him, enter into a contract with the city to do the work, with the bond hereinafter required, and any other bonds required by law. Said bids shall be opened by the legislative body in public session and publicly declared. and no bid shall be considered unless accompanied by said bond or said certified check. The legislative body must let the contract to the lowest responsible bidder who shall give bond for the faithful performance of the work in such sum as may be required by it, and such other bonds as may be required by law, with sureties satisfactory to said legislative body; provided, however, that the legislative body may reject any and all bids, should it deem this for the public good, and also the bid of any person who has been delinquent or unfaithful in the performance of any former contract with the city, or of any other contract let by or under the authority thereof.

The contract must provide that the work shall be done under the supervision of the city engineer or surveyor, and no work shall be paid for until it has been accepted by the legislative body. Whenever the contractor desires the work or part thereof to be accepted he must make written application to that effect to the legislative body. Upon the filing of such application for acceptance, the clerk of the legislative body shall give not less than five days' notice by publication by two insertions in a daily or weekly newspaper published and circulated in the city, or by posting for two days in three public places in the city, in case no such newspaper is published and circulated therein, that at a certain time and place to be named in said notice the legislative body of the city will hear and consider any objections to the acceptance of the work, or part of the work, for the acceptance of which said contractor has made such application, and only after such hearing shall any work be accepted. If upon such hearing any objections to the acceptance are made and are sustained by the legislative body, the legislative body must require the contractor to take such steps as will remove such objections; and in the event of his failure to do so

within such time as the legislative body shall prescribe, the legislative body may relet such portion of the work and charge the contractor the cost thereof together with all expenses incident to said releting, and retain the same out of any moneys due or to become due to him under the contract, and also hold him and his sureties responsible therefor upon his bond.

The contract shall provide that the work must be commenced within twenty days after the contractor receives written notice from the superintendent of streets that there is sufficient money in the special fund devoted to the proposed improvement to pay the contract price, and completed within such time as the legislative body shall prescribe. If the contractor abandons the work, or fails to proceed with the same as rapidly as required by his contract, the legislative body may relet the contract, or any portion thereof, and pay the cost of the same and also any expenses incidental to the releting, out of any funds due or to become due the contractor, and also hold him and his sureties responsible upon his bond for such cost and expenses, and also for any damages resulting from such abandonment.

Upon the signing of the contract for the doing of the work, the clerk of the legislative body, if there be no board of public works in said city, shall certify to such commission the amount of the contract price.

Assessment for Benefits. What Commission must Report.

§ 10. The commission shall, as soon as practicable, after determining what damages will be caused by said improvement, and, after the signing of the contract for the work, assess the total amount of the damages so determined, the total amount of the contract price for the doing of such work, and the total amount of all the incidental expenses of such improvement, which shall include the necessary expenses and disbursements of the commission, the cost of making the assessment, and all expenses necessarily incurred by the city in connection with the proposed improvement for maps, diagrams, plans, surveys and other matters incident thereto, upon the respective lots or parcels of land in the assessment district described in the ordinance or resolution of intention, in proportion to the benefits to be received by such lots or parcels of land, respectively, from the said improvement, and shall make and file with the clerk of the legislative body a report in writing containing the following:

1. A schedule describing the lots or parcels of land belonging to each petitioner for damages and which will be damaged by said proposed improvement, stating the amount of damages to each lot or parcel as determined by the commission, and the name of the owner of each such lot or parcel of land so damaged.

2. A diagram showing the assessment district, and also the boundaries and dimensions of the respective lots or parcels of land within said district, and each of such lots or parcels of land shall be given a separate number in red ink upon said diagram.

3. A proposed assessment of the total amount of damages that will be caused by said improvement, as determined by the commission, the total amount of the contract price for the work and the total amount of the incidental expenses thereof as above specified, upon the respective lots or parcels of land in said district in proportion to the benefits to be received by such lots or parcels of land, respectively, from said improvement. Said assessment shall refer to such lots or parcels of land upon said diagram by the red ink numbers thereof, and need contain no other description thereof, and shall show the names of the owners, if known, otherwise designating

them as unknown; but no mistake in the name of the owner of any lot or parcel of land shall affect the validity of the assessment thereon.

In case the commissioners do not all agree, a majority of the whole number may make such report.

Hearing of Report.

§ 11. Upon the filing of the report provided for in section 10 hereof, the clerk of the legislative body shall present such report to the legislative body, which shall fix a day for the hearing thereof by said legislative body, which day shall not be less than twenty days from the date of filing of such report, and shall cause a notice of such hearing to be published by the clerk thereof, by three insertions in a daily newspaper published and circulated in said city, or if there be no daily newspaper in said city, then by two successive insertions in a weekly newspaper so published and circulated; or if no newspaper is so published and circulated, then by posting for two days in three public places in said city. Such publication shall be completed at least ten days before the date fixed for the hearing. Said notice shall state the fact that such report has been filed, and the date set for the hearing thereof, and require all persons interested to file with the clerk their objections, if any they have, to the confirmation of said report at or before the time fixed for the hearing.

Objections, Action of Legislative Body on Report. Assessment-roll. Notice of Assessment.

§ 12. Any objections to said report shall be in writing signed by the objector, or his agent, and shall comply with the requirements of section 4 hereof for the form and substance of protests, and shall be filed with the clerk of the legislative body at or before the time fixed for the hearing. At the time fixed, or at any other time to which the hearing may be continued, the legislative body shall hear said report and any objections thereto, and any person interested may appear and be heard upon said report and objections.

After such hearing the legislative body shall pass upon the report and may confirm, modify or correct the same, or may confirm the report as modified or corrected, or order the commission to make and file a new report, which shall be heard in like manner as the first report, and after like notice of hearing. If no objections are filed, or if the objections filed are not sustained, the legislative body shall confirm the report. The action of the legislative body upon said report shall be declared by resolution entered upon its minutes, and shall be final and conclusive, except as to the damages to be caused by the proposed improvement; and when said report is confirmed, or is confirmed as modified or corrected, the clerk of the legislative body shall transmit the diagram and assessment provided for in section 10 hereof, as finally confirmed, to the city tax collector. The tax collector shall thereupon record such assessment and diagram in his office in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment-roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment-roll. Immediately upon such recording the several assessments contained in such assessment-roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made, paramount to all other liens, except taxes and prior assessments; and such lien shall only be discharged by payment of the assessment or by redemption of the land after sale for delinquency. The tax collector shall, upon the recording of said assessment,

give notice by publication for five days in a daily newspaper published and circulated in said city, or by two insertions in a weekly newspaper so published and circulated; or in case no such daily or weekly newspaper is so published and circulated in said city, then by posting such notice for four days in three public places in said city, that said assessment has been recorded in his office and that all sums assessed therein are due and payable immediately, and that payment of the said sums must be made to him within thirty days after the date of the first publication or posting, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of the said thirty days shall become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto. When payment of any assessment is made the tax collector shall mark opposite such assessment the word "paid," the date of payment, and the name of the person by or for whom the same is paid, and shall give a receipt therefor. Upon the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the tax collector shall mark each such assessment "delinquent" on said assessment-roll, and add five per cent to the amount thereof.

Delinquent Assessments, Publication of.

§ 13. The tax collector shall within ten days from the date of such delinquency begin the publication of a list of the delinquent assessments, which list must contain a description of each lot or parcel of land delinquent, and opposite each description the name of the owner as stated in the assessment-roll, and the amount of the assessment and costs due, including the cost of advertisement, which cost of advertisement shall not exceed the sum of fifty cents for each parcel of land separately assessed. He shall append to and publish with said delinquent list a notice that unless each assessment delinquent, together with the penalty and costs thereon, is paid, the property upon which such assessment is a lien will be sold at public auction at a time and place to be specified in the notice. Such publication must be made by five insertions in some daily newspaper published and circulated in the city, or by two insertions in a weekly newspaper so published and circulated, or, in case no such newspaper is so published and circulated in said city, such list of delinquent assessments and notice shall be posted in three public places in said city for five days. The time of sale must not be less than five days nor more than ten days after the last publication of said list, or after the completion of such posting, as the case may be, and the place of sale must be in or in front of the office of the tax collector.

At any time after such delinquency and prior to the sale of any piece of property assessed and delinquent, any person may pay the assessment on such piece of property together with the penalties and costs due thereon, including the cost of advertising, if such payment is made after the first publication of the list of delinquent assessments.

Sale of Property Advertised.

§ 14. At the time and place fixed for the sale the tax collector must commence the sale of the property advertised, commencing at the head of the list, and continuing in numerical order of lots or parcels of land until all are sold; provided, that he may postpone or continue the sale from day to day until all the property is sold. Each lot or parcel of land separately assessed must be offered for sale separately, and the person who will take the least quantity of land and then there pay the

amount of the assessment, penalty and costs due, including fifty cents to the tax collector for a certificate of sale, shall become the purchaser. In case there is no other purchaser for any lot or parcel of land offered for sale, the same shall be struck off to the city as purchaser.

Certificate of Sale.

§ 15. After making the sale the tax collector must execute in duplicate a certificate of sale setting forth a description of the property sold, the name of the owner thereof as given in the assessment-roll, that said property was sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which such property was sold, the date of sale, the name of the purchaser, and the time when the purchaser will be entitled to a deed. The tax collector must file one copy of such certificate in his office and deliver the other to the purchaser, or if the city is the purchaser, to the clerk of the legislative body, who shall file the same in his office. Upon the filing of the copy of such certificate in the office of the tax collector, the lien of the assessment shall vest in the purchaser and is only divested by a redemption of the property as in this act provided.

The tax collector shall also enter upon the assessment-roll opposite the description of each piece of property offered for sale, the description of the portion thereof sold, the amount for which the same was sold, the date of the sale and the name of the purchaser.

Redemption of Property Sold.

§ 16. At any time before the expiration of one year from the date of the sale, any lot or parcel of land sold for a delinquent assessment may be redeemed by any party in interest by the payment to the tax collector of the amount for which the property was sold, and in addition thereto, ten per cent thereon if paid within six months from the date of sale; and twenty-five per cent if paid within twelve months. When redemption is made the tax collector shall note that fact and the date thereof on the duplicate certificate of sale on file in his office, and deposit the amount paid with the city treasurer, who shall credit the purchaser named in the certificate of sale with the said amount and pay the same to such purchaser, or to his assigns, upon the surrender of the certificate of sale and upon satisfactory proof of assignment thereof, if any. When the city is the purchaser, the tax collector shall notify the clerk of the legislative body of the redemption and such clerk shall thereupon cancel the certificate of sale on file in his office.

Deeds to Purchaser. Service of Notice by Purchaser. Penalty on Redemption.

§ 17. At any time after the expiration of twelve months from the date of sale, the tax collector must execute to the purchaser, or to his assignee on his application, if such purchaser or assignee has complied with the provisions of this section, a deed of the property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof, and the fact that no person has redeemed the property. The tax collector shall receive from the applicant for a deed, one dollar for making such deed, unless the city is the purchaser, in which case no charge shall be made therefor. The purchaser or his assignee, must at least thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth a description of the property, that said property has

been sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which it was sold, the amount necessary to redeem at the time of giving notice, and the time when such purchaser or assignee will apply to the tax collector for a deed. If the said owner cannot be found, after due diligence, said notice must be posted in a conspicuous place upon said property, at least thirty days before the time stated therein, at which the application for a deed will be made. The person applying for a deed must file with the tax collector an affidavit or affidavits showing that notice of such application has been given, as herein required, and if the notice was not served on the owner of the property personally, that due diligence was used to find said owner; which affidavit or affidavits must be filed by the tax collector in his office. If redemption of the property is made after such affidavits are filed, and more than eleven months from the date of sale, the person making such redemption must pay, in addition to the other amounts required, three dollars for the service of notice and the making of such affidavits, which amount shall be paid over to the purchaser or his assignee in the same manner as other sums paid for redemption. No deed for any property sold for delinquent assessment shall be made until the purchaser or his assignee has complied with all the provisions of this section, and filed the proper affidavits with the tax collector.

Such deed shall be prima facie evidence of the truth of all matters recited therein and of the regularity of all proceedings prior to the execution thereof and of title in the grantee.

Disposition of Funds Collected.

§ 18. The funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment, or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said city, who shall place the same in a special fund designated by the number or name of the proceedings, and payments shall be made out of said special fund only for the purposes provided for in this act. To expedite the making of any such improvement, the legislative body may at any time transfer into said special fund, out of any money in the general fund, such sums as it may deem necessary, and the sums so transferred shall be deemed a loan to such special fund and shall be repaid out of the proceeds of the assessments provided for in this act. After all sales provided for in section 14 of this act have been made, the tax collector shall report to the legislative body of the city the amount collected.

Notice of Payment of Damages.

§ 19. When sufficient money is in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the total amount of estimated damages therefrom, all expenses of the proceeding and the cost of doing the work, it shall be the duty of the clerk of the legislative body to notify the contractor for the work of that fact, and to draw demands on said special fund for the respective amounts of damages awarded by the report, and to notify the owner of each parcel of land declared by the report to be damaged if the name of such owner is stated in the report, that the awards of damages are payable, and that he may receive the sum awarded to him on executing a release to said city of all liability for damages caused by said improvement. Such notification may be given by depositing a notice, postage prepaid, in the postoffice addressed to such person at his last known place of residence.

Refusal to Accept Award of Damages.

§ 20. If any owner of property that will be damaged by the proposed improvement shall fail or refuse to accept the amount awarded to him by the report provided for in section 10 hereof, the legislative body may cause proceedings to be brought against him in the name of the city, in the proper superior court, to have the amount of damage to such property determined. Such proceedings shall conform, as nearly as may be, to the provisions of the Code of Civil Procedure regarding eminent domain; provided, however, that the plaintiff shall not be required to pay the amount of damages awarded within thirty days after judgment. In such proceeding the ordinance ordering the improvement shall be conclusive evidence of the necessity of the same.

If no such proceeding is brought against him any owner of property that is damaged by the proposed improvement may decline to accept the amount awarded him, if any, and bring an action against the city to recover the amount to which he claims to be entitled. Any such action must be brought within thirty days after the final completion of the improvement. If in such action he fails to recover more than the amount awarded to him by the report aforesaid, he shall not recover costs.

Supplemental Assessment may be Ordered.

§ 21. If the first assessment for any improvement fails to raise a sufficient amount of money to pay all costs, damages and expenses of the improvement, including any judgments rendered in the actions and proceedings mentioned in section 20 and the costs and expenses of such actions or proceedings, the legislative body may pay the deficit out of the general fund, or may order a supplemental assessment to raise such deficit, which shall be made and collected in the same manner, as nearly as may be, as the first assessment, and so on until sufficient money shall have been raised to pay for such improvement.

Proof of Publication and Posting.

§ 21a. Proof of publication of any notice required by this act shall be made by affidavit as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting. [New section. Stats. 1911.]

Meanings of Certain Words.

§ 22. The following words and phrases shall, where used in this act, have the following meanings:

1. The term "improvement" includes all the improvements mentioned in section 1 of this act.

2. The term "city" includes every incorporated city, city and county, or other corporation organized for municipal purposes.

3. The term "city treasurer" includes any officer who has charge and makes payment of the city funds.

4. The term "superintendent of streets" includes any officer or board whose duty it is by law to have the care or charge of streets or the im-

provement thereof, in any city. In any city where there is no superintendent of streets, or such board, the legislative body is hereby authorized to designate some other officer to perform the duties imposed by this act on the superintendent of streets, and all the provisions hereof applicable to the superintendent of streets shall apply to the officer so designated.

5. The term "owner" or the term "any person interested" is deemed to be the person owning the fee, or the person in whom on the day any protest is filed, the legal title to real property appears by deeds duly recorded in the county recorder's office of the county in which said city is situate; or any person in possession of real property as the executor, administrator, trustee under an express trust, guardian or other legal representative of the owner, or any person in possession of real property under written contract of purchase, duly recorded.

6. The term "tax collector" includes any officer of the city whose duty it is to collect city taxes. In any city where there is no tax collector, the legislative body is hereby authorized to designate some other officer to perform the duties imposed by this act on the tax collector, and all the provisions hereof applicable to the tax collector shall apply to the officer so designated.

Certain Acts not Affected.

§ 23. This act shall in nowise affect an act entitled: "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885; or an act entitled: "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and also for payment of said bonds," approved February 27, 1893; or an act entitled: "An act to provide for local improvements upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities, such act to be known as the 'Local Improvement Act of 1901,'" which became a law February 26, 1901, or amendments to any of said acts, or any other acts on the same subject, or apply to proceedings had thereunder, but is intended to and does provide an alternate system for making the improvements provided for by this act; and it shall be in the discretion of the legislative body of any city to proceed, in making said improvements, under the provisions either of this act or of such other acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict herewith shall be void and of no effect as to the proceedings commenced under this act.

Construction. Name of Act.

§ 24. The provisions of this act shall be liberally construed to promote the objects thereof. This act may be designated and referred to as the "Street Improvement Act of 1909," and shall take effect and be in force upon its passage and approval.

7. The Tree Planting Act.

An act to provide for the planting, maintenance and care of shade trees upon streets, lanes, alleys, courts and places within municipalities, and of hedges upon the lines thereof; also, for the eradication of certain weeds within city limits.

[Approved March 11, 1893. Stats. 1893, p. 153.]

§ 1. All streets, lanes, alleys, places, or courts in the municipalities of this state now open or dedicated, or which may hereafter be opened or dedicated, to public use, whose grade has been officially established, and which have been actually graded in conformity therewith, may be planted with shade trees, along the edges of the sidewalks thereof, by order of the city council, which shall have power, also, to provide for the maintenance and care of the same; and the city council shall have power to prescribe the height, thickness, and manner of trimming of all hedges set out, or that shall hereafter be set out, along the line of any street, lane, alley, place, or court dedicated to public use, whether graded or not, and to compel compliance with its ordinances in the premises by the owners or occupants of the lots fronting thereon. The powers hereby conferred upon city councils shall be exercised in the manner and under the proceedings hereinafter described.

§ 2. The city council of any municipality in the state may, at its discretion, pass a resolution of intention to plant, or cause to be planted, with shade trees, any graded street, lane, alley, place, or court within the limits of such municipality. Such resolution of intention may embrace the entire length of any street, lane, alley, place, or court, or any portion thereof, but must specify the kind of trees to be planted, their size, age, and their distance apart. The street superintendent shall thereupon cause to be conspicuously posted along both sides of the street mentioned in the resolution, at not more than three hundred feet in distance apart, notices of the passage of said resolution. Said notice shall be headed "Notice to plant shade trees," in letters not less than one inch in length, and shall, in legible characters, set forth the language of the resolution, and the date of its passage. The city clerk shall also cause a copy of the resolution to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council. Should there be no daily newspaper published in said city then in such case publication may be made of such resolution, and of all other matters herein provided to be published, in a weekly newspaper, published and circulated in said city, and designated by said city council. [Amendment approved March 13, 1909. Stats. 1909, p. 331. In effect immediately.]

§ 3. The owners of a majority of the frontage of the property on both sides of the street proposed to be planted as aforesaid may, within ten days after the expiration of the time of publication of said resolution, file their written statement of the objections to the proposed work with the city clerk, which must be signed by the objectors, each one writing after his or her name the number of feet frontage owned by him or her. Such objection must show wherein the parties making them will be injured or aggrieved by the proposed work, and if the objection be to the kind of trees proposed to be planted, they must name some other kind of tree to be substituted therefor. The city council shall, at its next meeting after the filing of said objections, fix a time for hearing the same, not less than one week thereafter. The city clerk shall thereupon notify each objector, or

his agent, who has signed his or her name to the statement, by depositing, in the postoffice of said city a notice addressed to him or her, postage prepaid, notifying the objectors of the time and place of hearing. At the time specified, the council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive, except that in the choice of trees to be planted, it shall be governed by the written request of the owners of a majority of the frontage on both sides of the street which it is proposed to plant. If the objections be sustained, no further proceedings shall be taken under the resolution of intention for six months after the date of its passage. If it be again proposed to plant the street, the council shall commence proceedings de novo as if no action had been previously taken.

§ 4. At the expiration of ten days after the expiration of the time of publication of said resolution of intention, if no written objections to the work therein described shall have been filed with the city clerk, as hereinbefore provided, otherwise, immediately upon the overruling of the objections by the council, the council shall be deemed to have acquired jurisdiction to order to be done the work which is authorized by this act, which order shall be published for two days in the same papers and manner as provided for the publication of the resolution of intention.

§ 5. Before passing any resolutions for the planting of any street, the city council shall cause notice, with specifications, to be posted conspicuously for five days near the door of the council chamber, and shall advertise the same for five days in the same manner and papers as heretofore provided for the publication of the resolution of intention, inviting sealed proposals for bids for furnishing the trees and doing the work ordered. All bids shall state the sum or price for which the bidder will undertake to furnish the trees, of the kind, age, and size required, and will suitably prepare the ground, set out the trees, warrant every one of them to grow, or replace all that fail to grow or receive damage from whatever cause with others of the same kind, and of suitable age and size to preserve uniformity, and will for three years care for, cultivate, protect, irrigate, and trim said trees. And no order for the planting of any street shade trees shall be made that does not likewise provide for the care and maintenance of the trees for three years by the contractor planting the trees. All proposals or bids shall be accompanied by a check payable to the order of the mayor or president of the city council, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate proposal. Said proposals or bids shall be delivered to the clerk of the city council, indorsed "Proposals to plant trees," and said council shall, in open session, examine and publicly declare the same; provided, that no proposal or bid shall be considered unless accompanied by said check. The council may reject all proposals, should it deem this for the public good, and shall reject the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and may award the contract to the lowest responsible bidder, at the prices named in his bid, which award shall be approved by the mayor or president of the council. Notice of such awards of contract shall be posted and advertised for five days, in the manner hereinbefore provided, and it shall be the duty of the superintendnt of streets to enter into a contract with the bidder to whom the work shall have been awarded by the council, and at the prices specified in his bid; whereupon the certified checks of all the other bidders shall be returned to them, respectively. But if such lowest bidder neglects, fails, or refuses, for fifteen days after

the first posting and publication of the award, to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids, as in the first instance, and shall award the contract for said work to the then lowest bidder. If the contractor who shall have taken any contract shall not complete the planting, within the time limited in the contract, or within such further time as the council may give him, the superintendent of streets shall report such delinquency to the council, which may relet the unfinished portion of the planting and the future care of the trees, after pursuing the formalities hereinbefore prescribed for the letting of the whole in the first instance.

§ 6. All contractors shall, at the time of executing any contract for the planting and care of trees, execute a bond to the satisfaction of the mayor or president of the city council, with two or more sureties, and payable to the city in such sums as the mayor or president of the council shall deem adequate, conditioned for the faithful performance of the contract, and the sureties shall justify before the recorder or a justice of the peace, in double the amount mentioned in such bond, over and above all statutory exemption. Before being entitled to any contract, the bidder to whom the award shall have been made must pay into the city treasury the cost of the publication of notices, resolutions, and orders, and all other incidental expenses required under the proceedings prescribed by this act.

§ 7. All work done under the provisions of this statute shall be executed under the direction of the superintendent of streets, whose duty it shall be, under the general control of the council, to see that all the obligations assumed by contractors toward the city are faithfully complied with, and that all trees furnished are sound, healthy, free from infection by insects, and of the kind, size, and age called for by the contract. He shall certify to the completion of all work, or portion of work, which, by the terms of the contract, shall entitle the contractor to payment in whole or in part, and the presentation of his certificate by the contractor shall be a condition precedent to each payment that shall become due under the contract.

§ 8. All sums due to contractors under the provisions of this act shall be payable by installments, as follows, to wit: Not more than one-half the entire consideration in the contract shall be payable on the completion of the planting, and out of this amount the superintendent of streets shall see that the trees are paid for, to the party furnishing the same; one-half the balance at the end of eighteen months after the completion of the planting; provided, all conditions shall have been complied with; the remaining one-half to be paid at the end of three years after the completion of the planting; provided, all conditions shall have been complied with.

§ 9. Immediately upon the execution of any contract for the planting and care of street trees under the provisions of this act, it shall be the duty of the city assessor to make an assessment to cover the sum to become due for the work specified in such contract (including all incidental expenses) upon the lots and land fronting on the street, lane, alley, court, or place to which such contract relates, each lot or portion of a lot, being separately assessed, in proportion to the frontage, at a rate per foot front sufficient to cover the total expenses of the work. Said assessment shall briefly refer to the contract, the work contracted for, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per foot front assessed, the amount of each assessment, the name of the owner of each lot, if known to the assessor (if unknown, the word "Un-

known" shall be written opposite the number or description of the lot, with the amount assessed thereon). And the assessor shall attach to said assessment a diagram, exhibiting the street, lane, alley, place, or court on which the work is contracted to be done, and showing the relative location and frontage of such lot, numbered to correspond with the numbers in the assessment. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor or president of the council. The said assessments or warrants shall be separately issued for each payment that shall be due the contractor, as specified in section 8 of this act, and shall be substantially in the following form:

Form of the Warrant.

By virtue hereof, I (name of the superintendent of streets), of the city of ——, county of ——, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower (name of contractor), his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his warrant for the same.

Date ——, ——. (Name of superintendent of streets.)

Countersigned by (name of mayor or president of council.)

Recorded (date ——, ——). (Name of superintendent of streets.)

Said warrant, assessment, and diagram shall be recorded in the office of the superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots, assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged. From and after the date of said record, all persons interested in any manner in any or all of the lots assessed shall be deemed to have notice of the contents of said record.

§ 10. After said warrant, assessment, and diagram shall have been recorded, the same shall be delivered to the contractor, his agents or assigns, on demand, who shall thereby be authorized to demand and receive the amounts of the several assessments. In default whereof, and as regards enforced collections, interest, cost, and penalties, and the correction of errors, the same proceedings are to be had as are specified in sections 9, 10, 11, 12, 16, and 17 of an act entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March eighteenth, eighteen hundred and eighty-five, amended March fourteenth, eighteen hundred and eighty-nine.

§ 11. The city council of every municipality in this state has jurisdiction of the hedges and fences placed by property owners along street lines, and may, by ordinance, prohibit the planting of thorn-bearing hedges, and the use of barbed-wire along street lines, and may regulate the height, width, and the mode of trimming hedges, and enforce ordinances enacted for such purposes against absentees, or other negligent or recusant owners or occupants of lots or lands on which hedges are maintained. They may also condemn as public nuisances, any or all weeds whose seeds are of a winged or downy nature, and are spread by the winds, and may compel the eradication of such weeds by the owners of the lots whereon they grow, or at their expense.

§ 12. The city council or trustees of every municipality shall provide for the replacement of missing trees, and for the trimming and care of all trees that have or shall have been planted for three or more years in

the streets and highways, whether such planting shall have been done under this act or otherwise; the expense whereof must be defrayed out of the street fund, and the work be done by the superintendent of streets of such municipality.

§ 13. This act shall only apply to such municipalities as shall by vote of the electors residing therein determine to come within its provisions.

§ 14. This act shall take effect from and after its passage.

8. Street Lighting Act.

An act to provide for the lighting of public streets, lanes, alleys, courts and places in municipalities, and for the assessment of the costs and expenses thereof upon the property benefited thereby.

[Approved March 21, 1905. Stats. 1905, p. 564; Am. 1911.]

§ 1. Whenever the public interest or convenience may require, the city council of any municipality in the state shall have full power and authority to order poles, posts, wires, pipes, conduits and lamps, or any of said appliances, or any other suitable and necessary appliances, to be installed in and along the whole or any part of one or more public streets, lanes, alleys, courts or places in such municipality, for the purpose of lighting the same; also to acquire the use of poles, posts, wires, pipes, conduits and lamps, or any of said appliances, located or installed in and along the whole or any part of one or more public streets, lanes, alleys, courts or places in such municipality, for the purpose of lighting the same; also to order any such appliances, so installed or otherwise provided under this act, to be maintained; and also to order gas, electric current, or other illuminating agent, to be furnished for such lighting, in the manner and under the proceedings hereinafter described. [Amendment approved April 3, 1911.]

§ 2. Before ordering any improvement to be made, which is authorized by section 1 of this act, the city council shall adopt a resolution declaring its intention to do so, briefly describing the proposed improvement, which may include the whole or any part of one or more streets, lanes, alleys, courts or places, and specifying the exterior boundaries of the district to be benefited by said improvement, and to be assessed to pay the cost and expenses thereof, and to be known as the assessment district; provided that the city council may, in its discretion, order, in said resolution of intention, that a certain portion or percentage of the cost and expenses of said improvement, the amount of which portion or percentage shall be specified in said resolution, shall be paid out of the treasury of the municipality, from such fund as the city council may designate. Said proposed improvement may include any or all of the different kinds of work mentioned in section 1 of this act; provided, however, that the maintenance of appliances or the furnishing of gas, electric current or other illuminating agent, shall be for a period stated in the resolution of intention, but not exceeding two years. The city council shall, also, in the same resolution, refer the proposed improvement to the city engineer, if there be one, and if not, to some competent person employed by the municipality for the purpose and named in said resolution, and direct him to make and file with the clerk of the city council a report, in writing, presenting the following:

1. Plans and specifications for the work required in order to make said improvements;

2. An estimate of the cost of said improvement and of the incidental expenses in connection therewith;

3. A diagram showing the district above referred to, and also the boundaries and dimensions of the respective subdivisions of the land within said district, each of which subdivisions shall be given a separate number in red ink upon said diagram.

4. A proposed assessment of the total amount of the costs and expenses of the proposed improvement upon the several subdivisions of land in said district in proportion to the estimated benefits to be received by such subdivisions, respectively, from said improvement; provided, that whenever any portion or percentage of the cost and expenses of such improvement is ordered to be paid out of the treasury of the municipality, as hereinabove provided, the amount of such portion or percentage shall first be deducted from the total estimated cost and expenses of such improvement, and the assessment upon property, proposed in said report, shall include only the remainder of said estimated cost and expenses. Said assessment shall refer to such subdivisions upon said diagram by the respective red ink numbers thereof, and shall show the names of the owners, if known, otherwise designating them as unknown. No mistake in the name of the owner of any parcel of land shall affect the validity of the assessment thereon.

In any municipality having a board of public works or other board or commission in charge of street lighting, created by charter or by law, the proposed amendment shall be referred to said board or commission and the report provided for herein shall be made by said board or commission. [Amendment approved April 3, 1911.]

§ 3. Upon the filing of the report provided for in section 2 of this act, the said clerk shall present the same to the city council for consideration, and said council may modify the same in any respect, and, in case of any such modification, the report as modified shall stand as the report for the purpose of all subsequent proceedings. Thereafter the council, by resolution, shall appoint a time and place for hearing protests in relation to the proposed improvement, which time shall not be less than twenty days from the date of the passage of said resolution, and shall direct the clerk of the city council to give notice of said hearing, and shall designate the newspaper in which such notice shall be published.

§ 4. After the passage of the resolution mentioned in section 3 of this act, the clerk of said city council shall cause to be conspicuously posted along all streets and parts of streets within the assessment district described in the resolution of intention, at not more than three hundred feet in distance apart, notices (not less than three in all), of the passage of said resolution of intention and of the filing of said report. Said notices shall be headed "Notice of Local Improvement," in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said resolution of intention and of the filing of said report, and the date set for the hearing of said protests, and briefly describe the improvement proposed, and refer to said resolution and report further particulars. He shall also cause a notice similar in substance to be published for a period of two days in a daily newspaper, published and circulated in said municipality, and designated by said city council for that purpose, or if there is no daily newspaper in said municipality, then by two successive insertions in a weekly paper, so published, circulated and designated. Said notices must be posted and published, as above provided, at least ten days before the date set for the hearing of said protests.

§ 5. Any person interested, objecting to said improvement, or to the extent of the assessment district, or to the proposed assessment provided for in section 2 of this act, may file a written protest with the clerk of the city council at or before the time set for the hearing referred to in section 3 hereof. The clerk shall indorse on every such protest the date of its reception by him, and at the time appointed for the hearing above provided for, shall present to said city council all protests so filed with him. If such protests are against said improvement and said city council finds that the same are signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district, all further proceedings under said resolution of intention shall be barred and no new resolution of intention for the same improvement shall be passed within six months after the presentation of such protests to the city council, unless the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district shall in the meantime petition therefor. If such protests are against the improvement and the council finds that they are not signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within the assessment district, or if such protests are against the extent of the assessment district, the council shall hear said protests at the time appointed therefor, as above provided, or at any time to which the hearing thereof may be adjourned, and pass upon the same, and its decision shall be final and conclusive, and if such protests are sustained the proceedings shall be abandoned, but may be renewed at any time, and if such protests are denied, the proposed assessment shall be confirmed. If such protests are against the proposed assessment, the council shall hear said protests at the time appointed therefor as above provided, or at any time to which the hearing thereof may be adjourned, and may confirm, modify or correct said proposed assessment.

When, upon the hearing, said proposed assessment is confined, modified or corrected, or in case no protests are filed, the report provided for in section 2 hereof shall be adopted as a whole, with any modifications or corrections that have been made therein, and the city council shall by resolution, order said proposed improvement to be made, and declare its action upon said report and assessment, which resolution shall be final and conclusive on all persons, and the assessment shall be thereby levied upon the respective subdivisions of land in the assessment district.

§ 6. The validity of an assessment levied under this act shall not be contested in any action or proceeding unless the same is commenced within thirty days after the time said assessment is levied, and any appeal from a final judgment in such an action or proceeding must be perfected within thirty days after the entry of such judgment.

§ 7. Upon the passage of the resolution provided for in section 5 hereof, the clerk of said city council shall transmit to the tax collector of the municipality, the diagram and assessment provided for in subdivisions 3 and 4 of section 2 hereof, and any modifications or corrections thereof made by said city council.

§ 8. Upon the receipt of the diagram and assessment referred to in the last preceding section, the tax collector of the municipality shall record the same in a substantial book, to be kept for that purpose, in his office, and shall thereupon fix a day not less than twenty, nor more than thirty, days from the date of the receipt by him of said diagram and assessment after which all assessments unpaid shall become delinquent and ten per cent

shall be added to the amount thereof, and shall also fix a day for the sale of the various parcels of land within said district upon which the assessments are unpaid, which said date shall be not less than fifty days nor more than sixty days from the date of the receipt by him of said diagram and assessment.

§ 9. Notice of the sale of property upon which the said assessments are delinquent shall be given by said tax collector by posting and publication in the manner now provided by the general laws of the state of California, for giving notice of the sale of real estate upon execution, provided, however, that the descriptions of the various parcels of land need not be set out at length, but only by the respective numbers of the same as they appear upon the assessment and diagram, which shall be properly referred to in said notice, and said descriptions shall all be contained in one notice. At the time and place fixed for the sale of said property, the tax collector shall separately sell the respective parcels of land within said district, the assessments against which have not been paid, or so much of each parcel as shall be necessary to realize the amount assessed against said parcel, said ten per cent penalty for delinquency, and its proportion of the expenses of sale, in the order of their numbers upon said diagram. At said sale the municipality may be a purchaser.

§ 10. The tax collector shall issue for each sale an original and a duplicate certificate of sale, referring to the proceedings, describing the parcel sold, and giving the name of the purchaser and the amount for which said parcel was sold. The original certificate he shall deliver to the purchaser, and the duplicate he shall keep on file in his office in the form of a stub in the certificate-book.

§ 11. At any time before the expiration of one year from the date of the sale, any property sold under the provisions of the preceding sections may be redeemed by the payment to the tax collector of the amount for which the property was sold, with an additional penalty of twenty-five per cent of said amount. Said redemption money shall be paid by the tax collector to the person holding the original certificate of sale upon his delivering up the same and receipting for the amount received from the tax collector therefor. Upon redemption of any parcel of land the tax collector shall enter the fact and date of such redemption upon the duplicate certificate of sale thereof.

§ 12. If the property is sold, and is not redeemed within said period of one year from the date of the sale, the tax collector shall execute to the person named in the original certificate, or to his assignee, a deed of the property described in said certificate, which said deed shall refer in general terms to the proceedings under which the same is issued, and shall contain a description of the property. Such deed shall convey title in fee to said property, and the grantee is immediately, upon the receipt thereof, entitled to possession of the property described therein.

§ 13. The funds collected by the tax collector under the proceedings herein provided for, either upon voluntary payment, or as the result of sales, shall be paid by said tax collector, as fast as collected, to the treasurer of said municipality, who shall place the same in a special fund designated by the number or name of the proceeding, and payments shall be made out of said special fund only for the purposes provided for in this act. To expedite the making of any such improvement, the city council may at any time transfer into said special fund, out of any money in the general fund,

such sums as it may deem necessary, and the sums so transferred shall be deemed a loan to such special fund and shall be repaid out of the proceeds of the assessments provided for in this act.

§ 14. At any time after the funds for the work, or any part of the work, shall be in the hands of said treasurer, the city council may let the contract or contracts for such work, or the respective parts thereof. Every such contract shall be let to the lowest responsible bidder after notice published by two insertions in some newspaper published in such municipality, and designated by the city council for that purpose, or if there be no such newspaper, then by such posting as the city council may provide. Every bid shall be accompanied by a certified check, amounting to ten per cent of the bid, payable to the order of the clerk of said city council, and the same shall be forfeited to the municipality in case the bidder depositing the same does not, within fifteen days after written notice that the contract has been awarded to him, enter into a contract with the municipality for the work, the faithful performance of which shall be secured by an undertaking in such penal sum as the city council shall require, with sureties satisfactory to said council. The contract must provide that the work shall be done, and the work must be done, strictly in accordance with the plans and specifications contained in the report provided for in sections 2 and 3 of this act. The work must be done under the supervision of the board, officer or person by whom the report provided for in section 2 of this act was made, and no work shall be paid for until it has been accepted by said board, officer or person. If the contractor abandons the work, or fails to proceed with the same as rapidly as required by his contract, the said city council may relet the work in the same manner as in the case of the first letting thereof, and retain the amount of the cost of the same, and of any expense incidental to the reletting out of any funds due, or to become due, to the contractor, and also hold him and his sureties responsible for such cost and expense, and for any damages resulting from such abandonment or failure upon his bond; provided, however, that the city council, in its discretion, may, at any time within ten days after the award of any contract, as above provided, or at any time within ten days after the time fixed for the opening of bids, if no bids have been received, order by resolution adopted by a vote of two-thirds of all its members, that said proposed contract be not made, and that the municipality itself execute the work embraced therein, in accordance with the plans and specifications adopted for such work, and employ the labor, and provide the material, appliances, supplies and illuminating agent necessary therefor; and the cost and expenses of such work shall be paid out of the aforesaid funds; and provided further, that the amount appropriated and used from said funds for said purpose shall not exceed the amount of the bid upon which the award of contract aforesaid was made or if no bids have been received and the work is to be executed by the municipality itself as herein provided, such cost and expense shall not exceed the amount of the estimate thereof provided for in section 2 of this act; and if such cost and expense shall exceed the amount of said bid, or of said estimate in case no bids are received, then such excess shall be met out of any moneys in the general fund in the treasury of said city. [Amendment approved April 3, 1911.]

§ 15. In case the first assessment for any improvement provided for in this act proves insufficient, a supplemental assessment may be made to raise the deficit, in the same manner as nearly as may be, as the first assessment,

except that protests may only be made against such supplemental assessment, and so on until sufficient money shall have been realized to pay for such improvement. [Amendment approved April 3, 1911.]

§ 16. If at any time an assessment for any such improvement shall realize a larger sum than is necessary therefor, the excess shall be refunded pro rata to the parties by whom it was paid.

§ 17. Every special assessment levied under this act shall, from the date of the levy thereof, be a lien upon the land upon which it is levied paramount to all other liens, except prior assessments and taxation, and such lien shall continue until such special assessment is paid, or until the property is sold and a deed is made therefor to the purchaser as hereinbefore provided, and all parties shall have constructive notice of such lien from the date of the passage of the resolution referred to in section 5 thereof.

§ 18. The following words and phrases shall, where used in this act, have the following meanings:

(1) The term "improvement" includes all work and improvements mentioned in section 1 of this act.

(2) The terms "municipality" and "city" include every incorporated city, city and county, or other corporation organized for municipal purposes.

(3) The terms "city council" and "council" include any body or board in which by law is vested the legislative power of any city.

(4) The terms "treasurer" and "city treasurer" include any person or officer who has charge and makes payments of the city funds.

(5) The term "city engineer" includes any person or officer who has charge of the surveying and engineering work of said city.

§ 19. This act shall take effect and be in force from and after its passage.

9. Street Opening Act of 1889.

An act to provide for laying out, opening, extending, widening, straightening, or closing up in whole or in part any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose.

[Approved March 6, 1889. Stats. 1889, p. 70.]

Amended 1909, p. 1034.

Laying Out, Opening, Closing, etc., Streets, Lanes, Alleys, etc.

§ 1. Whenever the public interest or convenience may require, the city council of any municipality shall have full power and authority to order the opening, extending, widening, straightening, or closing up in whole or in part of any street, square, lane, alley, court, or place within the bounds of such city and to condemn and acquire any and all land and property necessary or convenient for that purpose.

Resolution of Council Declaring Intention to Perform Street Work.

§ 2. Before ordering any work to be done or improvement made which is authorized by section one of this act, the city council shall pass a resolution declaring its intention to do so, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost, and expenses thereof.

Street Superintendent to Post Notice.

§ 3. The street superintendent shall then cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. Said notice shall be headed "Notice of Public Work," in letters not less than one inch in length, shall be in legible characters, state the fact of passage of the resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for a period of ten days in one or more daily newspapers published and circulated in said city, and designated by said city council; or if there is no daily newspaper so published and circulated in said city, then by four successive insertions in a weekly or semi-weekly newspaper, so published, circulated, and designated.

Interested Person may File Objections.

§ 4. Any person interested objecting to said work or improvement, or to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the cost and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice, which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and at the next meeting of the city council after the expiration of said ten days lay said objections before said city council, which shall fix a time for hearing said objections, not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to such objector.

Decision of Council to be Final.

§ 5. At the time specified or to which the hearing may be adjourned, the said city council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If such objections are sustained, all proceedings shall be stopped, but proceedings may be again commenced at any time by giving notice of intention to do said work or make said improvement. If such objection is overruled by the city council, the proceedings shall continue the same as if such objection had not been made. At the expiration of the time prescribed during which objections to said work or improvement may be made, if no objection shall have been made, or if an objection shall have been made, and said council, after hearing, shall have overruled the same, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvements to be made, which is authorized by section 1 of this act.

Jurisdiction.

§ 6. Having acquired jurisdiction as provided in the preceding section, the city council shall order said work to be done, and unless the proposed work is for closing up, and it appears that no assessment is necessary, shall appoint three commissioners to assess benefits and damages, and have general supervision of the proposed work or improvement until the completion thereof in compliance with this statute. For their services, they shall receive such compensation as the city council may determine from time to time; provided, that such compensation shall not exceed two hundred dollars per month each, nor continue more than six months, unless extended by order of the city council. Such compensation shall be added to and be

chargeable as a part of the expenses of the work or improvement. Each of said commissioners shall file with the clerk of the city council an affidavit, and a bond to the state of California, in the sum of five thousand dollars, to faithfully perform the duties of his office. The city council may at any time remove any or all of said commissioners for cause, upon reasonable notice and hearing, and may fill any vacancies occurring among them for any cause.

Commissioners to Employ Assistance.

§ 7. Said commissioners shall have power to employ such assistance, legal or otherwise, as they may deem necessary and proper; also to rent an office, and provide such maps, diagrams, plans, books, stationery fuel, lights, postage, expressage and incur such incidental expenses as they may deem necessary.

Expenses to be a Charge upon the Particular Work Required.

§ 8. All such charges and expenses shall be deemed as expenses of said work or improvement, and be a charge only upon the funds devoted to the particular work or improvement, as provided hereinafter. All payments, as well for the land and improvements taken or damaged, as for the charges and expenses, shall be paid by the city treasurer, upon warrants drawn upon said fund from time to time, signed by said commissioners, or a majority of them. All such warrants shall state whether they are issued for land or improvements taken or damaged, or for charges and expenses, and that the demand is payable only out of the money in said fund, and in no event shall the city be liable for the failure to collect any assessment made by virtue hereof, nor shall said warrant be payable out of any other fund, nor [be] a claim against the city.

Assessment for Damages.

§ 9. Said commissioners shall proceed to view the lands described in the resolution of intention, and may examine witnesses on oath to be administered by any one of them. Having viewed the land to be taken, and the improvements affected, and considered the testimony presented, they shall proceed, with all diligence, to determine the value of the land, and the damage to improvements and property affected, and also the amount of the expenses incident to said work or improvement, and having determined the same shall proceed to assess the same upon the district of lands declared benefited, the exterior boundaries of which were fixed by the resolution of intention provided for by section 2 hereof. Such assessment shall be made upon the lands within said district in proportion to the benefit to be derived from said work or improvement, so far as the said commissioners can reasonably estimate the same, including in such estimate the real property of any railroad company within said district, if such there be, and may also include in such estimate any or all public property within said district. [Amendment approved April 21, 1909. Stats. 1909, p. 1034. In effect immediately.]

Report to Council Accompanied With a Plat of the Assessment District.

§ 10. Said commissioners having made their assessment of benefits and damage, shall, with all diligence. make a written report thereof to the city council, and shall accompany their report with a plat of the assessment district showing the land taken or to be taken for the work or improvement, and the lands assessed, showing the relative location of each district, block, lot, or portion of lot, and its dimensions, so far as the commissioners can reasonably ascertain the same. Each block and lot, or portion of lot, taken

or assessed, shall be designated and described in said plat by an appropriate number, and in reference to it by such descriptive number shall be a sufficient description of it in any suit entered to condemn, and in all respects. When the report and plat are approved by the city council, a copy of said plat, appropriately designated, shall be filed by the clerk thereof in the office of the recorder of the county.

Report What must Specify.

§ 11. Said report shall specify each lot, subdivision, or piece of property taken or injured by the widening or other improvement, or assessed therefor, together with the name of the owner or claimants thereof, or of persons interested therein as lessees, encumbrancers, or otherwise, so far as the same are known to such commissioners, and the particulars of their interest, so far as the same can be ascertained, and the amount of value or damage, or the amount assessed, as the case may be.

When Set Down to Unknown Owners.

§ 12. If in any case the commissioners find that conflicting claims of title exist, or shall be in ignorance or doubt as to the ownership of any lot of land, or of any improvements thereon, or of any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any land or improvements, or of the particulars of their interest, shall not affect the validity of the assessment or of the condemnation of the property to be taken.

Filing of Report and Plat, and Publication of.

§ 13. Said report and plat shall be filed in the clerk's office of the city council, and thereupon the clerk of said city council shall give notice of such filing by publication for at least ten days in one or more daily newspapers published and circulated in said city; or if there be no daily paper, by three successive insertions in a weekly or semi-weekly newspaper so published and circulated. Said notice shall also require all persons interested to show cause, if any, why such report should not be confirmed, before the city council on or before a day fixed by the clerk thereof, and stated in said notice, which day shall not be less than thirty days from the first publication thereof.

Objections must be in Writing.

§ 14. All objections shall be in writing, and filed with the clerk of the city council, who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the city council, which shall fix a time for hearing the same, of which the clerk shall notify the objectors in the same manner as objectors to the original resolution of intention; at the time set, or at such other time as the hearing may be adjourned to, the city council shall hear such objections and pass upon the same; and at such time, or, if there be no objections, at the first meeting after the day set in such order to show cause, or such other time as may be fixed, shall proceed to pass upon such report, and may confirm, correct, or modify the same, or may order the commissioners to make a new assessment, report, and plat, which shall be filed, notice given, and hearing had, as in the case of an original report.

Duty of Clerk of Council.

§ 15. The clerk of said city council shall forward to the street superintendent of the city a certified copy of the report, assessment, and plat, as finally confirmed and adopted by the city council. Such certified copy

shall thereupon be the assessment-roll. Immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein.

Duty of Superintendent of Streets on Receiving Certified Copy of Report as Confirmed by Council.

§ 16. The superintendent of streets shall thereupon give notice by publication for ten days in one or more daily newspapers published and circulated in such city or city and county, or by two successive insertions in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto. When payment of any assessment is made to said superintendent of streets, he shall write the word "Paid," and the date of payment, opposite the respective assessment so paid, and the names of persons by or for whom said assessment is paid, and shall, if so required, give a receipt therefor. On the expiration of said thirty days, all assessments then unpaid shall be and become delinquent, and said superintendent of streets shall certify such fact at the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent. The said superintendent of streets shall, within five days from the date of said delinquency, proceed to advertise and collect the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece, or parcel of land separately assessed, by the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes; and after the date of said delinquency, and before the time of such sale herein provided for, no assessment shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the costs of advertising then already incurred, shall be paid therewith. Said list of delinquent assessments shall be published daily for five days in one or more daily newspapers published and circulated in such city, or by at least one insertion in a weekly newspaper so published and circulated, before the day of sale of such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment-list, and the place must be in or in front of the office of said superintendent of streets. All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the superintendent of streets may collect for each certificate fifty cents, and for each deed one dollar. All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds. The deed of the street superintendent made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee. It shall be

conclusive evidence of the necessity of taking or damaging the lands taken or damaged, and of the correctness of the compensation awarded therefor. The superintendent of streets shall, from time to time, pay over to the city treasurer all moneys collected by him on account of any such assessments. The city treasurer shall, upon receipt thereof, place the same in a separate fund, designating such fund by the name of the street, square, lane, alley, court, or place for the widening, opening, or other improvement of which the assessment was made. Payments shall be made from said fund to the parties entitled thereto, upon warrants signed by the commissioners, or a majority of them.

Payments for Land and Improvements, When and How Made.

§ 17. When sufficient money is in the hands of the city treasurer, in the fund devoted to the proposed work or improvement, to pay for the land and improvements taken or damaged, and when in the discretion of the commissioners, or a majority of them, the time shall have come to make payments, it shall be the duty of the commissioners to notify the owner, possessor, or occupant of any land or improvements thereon to whom damages shall have been awarded, that a warrant has been drawn for the payment of the same, and that he can receive such warrant at the office of such commissioners upon tendering a conveyance of any property to be taken; such notification, except in the case of unknown owners, to be made by depositing a notice, postage paid, in the postoffice, addressed to his last known place of abode or residence. If at the expiration of thirty days after the deposit of such notice, he should not have applied for such warrant, and tendered a conveyance of the land to be taken, the warrant so drawn shall be deposited with the county treasurer, and shall be delivered to such owner, possessor, or occupant, upon tendering a conveyance as aforesaid, unless judgment of condemnation shall be had, when the same shall be canceled.

Proceedings to Condemn on Refusal to Accept Payment.

§ 18. If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor, as aforesaid, or objects to the report as to the necessity of taking his land, the commissioners, with the approval of the city council, may cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity. Such proceedings shall be brought in the name of the municipality, and have precedence so far as the business of the court will permit; and any judgment for damages therein rendered shall be payable out of such portion of the special fund as may remain in the treasury, so far as the same can be applied. At any time after trial and judgment entered, or preceding an appeal, the court may order the city treasurer to set apart in the city treasury a sufficient sum from the fund appropriated to the particular improvement to answer the judgment and all damages, and thereupon may authorize and order the municipality to enter upon the land and proceed with the proposed work and improvement. In case of a deficiency in said fund to pay the whole of such judgment and damages, the city council may, in their discretion, order the balance thereof to be paid out of the general fund of the treasury or to be distributed by the commissioners over the property assessed by a supplementary assessment; but in the last-named case, in order to avoid delay, the city council may advance

such balance out of any appropriate fund in the treasury, and reimburse the same from the collections of the assessment. Pending the collection and payment of the amount of the judgment and damages, the court may order such stay of proceedings as may be necessary.

Duty of Treasurer on Payment of Warrants.

§ 19. The treasurer shall pay such warrants out of the appropriate fund, and not otherwise, in the order of their presentation; provided, that warrants for land or improvements taken or damaged shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money is and remains in the fund to pay all warrants of the first class before paying any of the second.

Supplementary Assessments, When may be Ordered.

§ 20. If after the sale of the property for delinquent assessments there should be a deficiency, and there should be unreasonable delay in collecting the same, or if for the purpose of equalizing the assessments supplying a deficiency, or for any cause it appears desirable, the commissioners may so report to the city council, who may order them to make a supplementary assessment and report the same in manner and form as the original, and subject to the same procedure. If by reason of such supplementary assessment, or for any cause, there should be at any time a surplus, the city council may appropriate the same and declare a dividend pro rata to the parties paying the same, and they, upon demand, shall have the right to have the amount of such pro rata dividends refunded to them, or credited upon any subsequent assessment for taxes made against said parties in favor of said city.

Proceedings to Settle Defective Title.

§ 21. If any title attempted to be acquired by virtue of this act shall be found to be defective from any cause, the city council may again institute proceedings to acquire the cause as in this act provided, or otherwise, or may authorize the commissioners to purchase the same and include the cost thereof in a supplementary assessment as provided in the last section.

Proceedings When Boundaries of Districts of Lands Affect the Whole City.

§ 22. If the city council deem it proper that the boundaries of the districts of lands to be affected and assessed to pay the damages, cost and expenses of any work or improvement under this act, shall include the whole city, then the commissioners appointed shall proceed in a summary manner to purchase the lands to be taken or condemned from the owners and claimants thereof. If said commissioners and the owners and claimants cannot agree upon the price to be paid for said lands, they shall proceed to view and value the same, and shall thereupon make a summary report to the city council. Upon final confirmation of the report, the city council, if there be not sufficient money available in the city treasury, shall cause the cost and expenses of the contemplated public improvement to be assessed upon the whole of the taxable property of said city, and to be included in and form part of the next general assessment-roll of said city, and with like effect in all respects as if the same formed a part of the city, state, and county taxes; and when the same shall have been collected the said city council shall cause the land required to be paid for or the value thereof tendered, and the said contemplated public improvement to be forthwith made and completed. All the provisions of the preceding sections not in conflict with this section shall be applicable thereto.

Use of Words "Work" and "Improvement."

§ 23. 1. The words "work" and "improvement," as used in this act, shall include all work mentioned in section 1 of this act.

Notices to be Posted When Publication cannot be Had.

2. In case there is no daily or weekly or semi-weekly newspapers printed and circulated in the city, then such notices as are herein required to be published in a newspaper shall be posted and kept posted for the length of time required herein for the publication of the same in a weekly newspaper, in three of the most public places in such city. Proof of the publication or posting of any notice provided for herein shall be made by affidavit of the owner, publisher or clerk of the newspaper or of the poster of the notice.

Construction of Words "Municipality" and "City."

3. The word "municipality" and the word "city" shall be understood and so construed as to include all corporations heretofore organized and now existing, or hereafter organized, for municipal purpose.

Construction of Terms "Street Superintendent" and "Superintendent of Streets."

4. The terms "street superintendent" and "superintendent of streets," as used in this act, shall be understood and so construed as to include, and are hereby declared to include any person or officer whose duty it is, under the law, to have the care or charge of the streets, or the improvement thereof, in any city. In all those cities where there is no street superintendent or superintendent of streets, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of street superintendent or superintendent of streets; and all the provisions hereof applicable to the street superintendent or superintendent of streets shall apply to such persons so appointed.

Construction of Term "City Council."

5. The term "city council" is hereby declared to include any body or board which, under the law, is the legislative department of the government of any city.

Construction of Terms "Clerk" and "City Clerk."

6. The terms "clerk" and "city clerk," as used in this act, is hereby declared to include any person or officer who shall be clerk of said city council.

Construction of Terms "Treasurer" and "City Treasurer."

7. The term "treasurer" or "city treasurer," as used in this act, shall include any person or officer who shall have charge and make payment of the city funds.

8. No publications of notice other than that provided for in this act shall be necessary to give validity to any proceedings had thereunder.

Proceedings Commenced Before Passage of This Act to be Continued by Resolution of Council.

§ 24. The proceedings and any work or improvement, such as is provided for in this act, already commenced, and now progressing under any other act now in force, or by virtue of any ordinance passed by any city council or board of supervisors of any city, county, or city and county, by virtue of any other act now in force, may, from any stage of such proceedings already commenced and now progressing, be continued under this act by resolution of the city council. The said work or improvement may then be

conducted under the provisions of this act with full force and effect in all respects, from the stage of such proceedings under such other acts or ordinances at and from which such resolution shall declare an election or intention to have said work or improvement cease under such other act or ordinance, and continue under this act; and from such election so made, all proceedings heretofore had under such other act or ordinance are hereby ratified, confirmed, and made valid, and it shall be unnecessary to renew or conduct over again proceedings had under such other act or ordinance. This section shall not apply to any work or improvement, proceedings in which were commenced more than eighteen months prior to the passage of this act.

Act to be Liberally Construed.

§ 25. The provisions of this act shall be liberally construed to promote the objects thereof. This act shall take effect and be in force from and after its passage.

An act fixing and regulating the manner of sale and redemption of real property for delinquent assessments to pay the damages, costs, and expense for or incident to laying out, opening, extending, widening, straightening, diverting, curving, contracting, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities in this state.

[Approved March 27, 1895. Stats. 1895, p. 204.]

§ 1. All sales, and redemptions after sale, of any real property upon which the assessment levied and assessed to pay the damages, costs, and expense for or incident to laying out, opening, extending, widening, straightening, diverting, curving, constructing, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities in this state shall remain unpaid and become delinquent under the provisions of any act or law regulating such matters, shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, Anno Domini eighteen hundred and ninety-five.

§ 2. All acts or parts of acts in conflict with this act are hereby repealed.

§ 3. This act shall take effect and be in force from and after its passage and approval.

10. Street Opening Act of 1903.

An act to provide for the laying out, opening, extending, widening, or straightening, in whole or in part, of public streets, squares, lanes, alleys, courts, and places, within municipalities, for the condemnation of property necessary or convenient for such purposes, and for the establishment of assessment districts and the assessment of property therein to pay the expense of such improvement.

[Approved March 24, 1903. Stats. 1903, p. 376.]

Amended 1909, p. 1035; 1911.

§ 1. Whenever the public interest or convenience may require, the city council of any municipality shall have full power and authority to order the laying out, opening, extending, widening, or straightening, in whole or in

part, of any public street, square, lane, alley, court, or place within such municipality, and to acquire, by condemnation, any and all property necessary or convenient for that purpose.

§ 2. Before ordering any improvement to be made, which is authorized by section 1 of this act, the city council shall pass an ordinance declaring its intention to do so, describing the improvement, and the land necessary or convenient to be taken therefor, and specifying the boundaries of the district to be benefited by said improvement, and to be assessed to pay the expense thereof, and to be known as the assessment district.

§ 3. The street superintendent shall thereupon cause to be conspicuously posted along all streets and parts of streets within the assessment district described in said ordinance, at not more than three hundred feet in distance apart, notices (not less than three in all) of the passage of said ordinance. Said notices shall be headed, "Notice of Public Work," in letters not less than one inch in length, shall be in legible characters, and shall state the fact and date of the passage of said ordinance, and briefly describe the improvement proposed, and refer to said ordinance for further particulars. He shall also cause a notice similar in substance to be published for a period of five days, in a daily newspaper published and circulated in said municipality, and designated by said city council for that purpose, or if there is no such daily newspaper, then by four successive insertions in a weekly newspaper so published, circulated, and designated.

§ 4. Any person interested, objecting to said improvement, or to the extent of the assessment district, described in said ordinance of intention, may file a written protest with the clerk of the city council, within thirty days after the first publication of the notice required by section 3 of this act. Every such protest must contain a description of the property in which each signer thereof is interested, sufficient to identify the same, and must set forth the nature of his interest therein, and must be accompanied by the affidavit of one of the signers thereof that each signature thereof is the genuine signature of the person whose name is thereto subscribed; and in case any signature is made by an agent, there must be attached to the protest the affidavit of the agent that he is duly authorized to sign such protest. Any protest not complying with the foregoing requirements, shall not be considered by the city council. In the case of property held by tenancy in common, if any cotenant sign such protest, only the proportionate share of the frontage thereof represented by his interest therein, shall be counted in determining the amount of frontage represented by such protest. The clerk shall indorse on every such protest the date of its reception by him, and, at the next regular meeting of the city council, after the expiration of the time for filing protests, he shall present to said city council all protests so filed with him. If such protests are against said improvement, and said city council finds that the same are signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district, all further proceedings under said ordinance of intention, excepting in the cases hereinafter otherwise provided, shall be barred, and no new ordinance of intention for the same improvement shall be passed within six months after the presentation of such protest to the city council, unless the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district shall in the meantime petition therefor. If such protests are against the improvement, and the council finds that they are not signed by the owners of a majority of the frontage of the property fronting on

streets or parts of streets within said assessment district, or if such protests are only against the extent of said assessment district, or if the proposed improvement is for the opening or extending of a street for a distance of not more than two blocks intervening between the terminations of two different streets, or two portions of the same street, existing at the time of the passage of the ordinance of intention for the proposed improvement, each of said different street or said portions of the same street being at least five blocks in length, and the opening or extending of the street described in the ordinance of intention through such intervening block or blocks will, together with such different streets or portions of the same street so existing, make one connecting or continuous street, as nearly as may be practicable, or if the proposed improvement is for the opening or extending of a street into a different street, for a distance of not more than one block intervening between the termination of such street so proposed to be opened or extended and such different street, when the street so proposed to be opened or extended through such intervening block exists, at the time of the passage of the ordinance of intention for a distance of at least five blocks, or if the proposed improvement is for the opening or extending of a public street, lane, alley, court or place through the remainder of a block when such public street, lane, alley, court or place exists, at the time of the passage of the ordinance of intention for the proposed improvement, for at least one-half of the distance through such block, the city council shall thereupon fix a time for hearing said protests, not less than ten days after the meeting of the council at which such time is so fixed, and shall cause notice of the time of such hearing to be published for at least five days in a daily newspaper published and circulated in said city, or if there be no such daily newspaper, by at least two insertions in a weekly newspaper so published and circulated. The city council shall hear said protests at the time appointed, or at any time to which the hearing thereof may be adjourned, and pass upon the same, and its decision thereon shall be final and conclusive. If any such protests are sustained, no further proceedings shall be had under said ordinance of intention, but a new ordinance of intention for the same improvement may be passed at any time. If the protests are denied, the proceedings shall continue as if such protests had not been made. At the expiration of the time within which protests may be filed, if none are filed, or if protests are filed, and after hearing are denied, as above provided, then upon such denial, the city council shall acquire jurisdiction to order the improvement described in the ordinance of intention. [Amendment approved April 21, 1909. Stats. 1909, p. 1035.]

§ 5. Having acquired jurisdiction, the city council shall, by ordinance, order said improvement to be made, and direct an action to be brought by the city attorney, in the proper superior court, in the name of the municipality, for the condemnation of the property necessary or convenient to be taken therefor. Such ordinance need not describe the property to be taken, nor the assessment district, but may refer to the ordinance of intention for all particulars.

§ 6. Said action must be brought within sixty days after the passage of the ordinance ordering the improvement, but the council may, by ordinance, extend the time for bringing such action for an additional period not exceeding ninety days. Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may be hereafter adopted, as may be applicable thereto, except

in the particulars otherwise provided for in this act. [Amendment approved April 21, 1909. Stats. 1909, p. 1037.]

§ 7. The complaint shall set forth, or state the effect of, the ordinance of intention, and the ordinance ordering the improvement, but need not set up any other proceedings had before the bringing of the action. Said ordinances shall be conclusive evidence, in such action, of the public necessity of the proposed improvement, and also that the same is located in the manner which will be most compatible with the greatest public good and the least private injury.

§ 8. When all parties defendant to the action have answered, or have been served with summons, and their default entered, the plaintiff or any party defendant to the action whose default has not been so entered, may, upon five days' notice to the parties, except defendants in default, move the court to set the action for trial. If, upon the hearing of such motion, a trial by jury or by the court without a jury is not demanded by the defendants, or any of them, or by the plaintiff, such trial shall be deemed to be waived, and the court must appoint three disinterested persons referees, to ascertain the compensation to be paid to such defendants so waiving a trial by a jury, or by the court without a jury. Such referees must be residents of the municipality where such improvement is to be made, and over the age of twenty-one years, and must take and file with the court an oath to discharge their duties faithfully and impartially. If any of such referees fails to qualify, or resigns, or is removed by order of court, or is or becomes unable to act, the vacancy so created shall be filled by the court. [Amendment approved April 21, 1909. Stats. 1909, p. 1037.]

§ 9. The referees shall at once proceed to view the lands sought to be condemned, and ascertain the compensation proper to be paid to such of the parties interested in each parcel thereof as have waived a trial by a jury, or by the court. They shall have power to examine witnesses under oath, to be administered by any of them, and may have subpoenas issued by the clerk of the court, requiring the attendance of witnesses, or the production of evidence before them. They shall make and file with the court a written report of their findings, and of their necessary expenses, within thirty days after the date of their appointment; provided, however. that the time so allowed may be extended, upon good cause shown, by the court or judge thereof, but such extension shall not exceed ninety days; and provided further, that if any vacancy in the referees is created and filled as provided in section 8 of this act, or if new referees are appointed, or if a new report from the same referees is ordered, as provided in section 11 of this act, the time herein specified for the filing of such report shall be deemed to be thirty days from the date of the order filling such vacancy, or appointing new referees, or ordering a new report from the same referees, and the same may be extended accordingly, as above provided. Any two of such referees who agree thereto, may make such report. [Amendment approved April 21, 1909. Stats. 1909, p. 1038.]

§ 10. For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act. No improvements placed

upon the property proposed to be taken, subsequent to the date of the publishing of the notice of the passage of the ordinance of intention, shall be included in the assessment of compensation or damages.

The referees, or court, or jury, as the case may be, shall find separately:

First. The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein;

Second. If any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Such damages must be fixed irrespective of any benefit from such improvement. [Amendment approved April 21, 1909. Stats. 1909, p. 1038.]

§ 11. Upon the filing of such report the court must, upon motion of any party, appoint a day for hearing the same, not less than twenty days thereafter. Notice of the time and place of said hearing must, at least ten days before the time so appointed, be served on all the other parties, except defendants whose default has been entered. The plaintiff, or any defendant who has answered, may file exceptions in writing to said report, specifying the grounds upon which such exceptions are based, at any time within not less than one day prior to the hearing; and any such party so filing exceptions to said report, may appear at the hearing of said report and contest the same. In addition to the notice hereinbefore provided, the clerk of the court must give notice of the filing of said report, and of the time and place appointed for the hearing of the same, to all persons owning or having an interest in any property included within the assessment district for said improvement described in the ordinance of intention, by causing said notice last mentioned to be published for five days in a daily newspaper published and circulated in the city; and, if there be no such daily newspaper, then by two insertions in a weekly newspaper so published and circulated. Any publication of such notice shall commence at least ten days before the time appointed for the hearing of the report. Said notice shall require all persons owning or having an interest in any property included within said assessment district for said improvement to intervene in said action, and file, in the office of the clerk of said court, his exceptions in writing to said report, if any he has, specifying the grounds upon which such exceptions are based. Said notice shall also contain a description of the said assessment district as set forth in the ordinance of intention. At any time within not less than one day prior to the hearing, any person not a party to the action, owning or having an interest in any property included within said assessment district, may intervene in the action, and file his exceptions in writing to said report, specifying the grounds upon which such exceptions are based; and any such person so intervening may appear and contest the said report, and introduce evidence in support of such exceptions. After hearing the report, and any exceptions thereto, the court may confirm the report, or may modify it and confirm it as modified, or may set it aside and order a new report from the same referees, or from new referees to be appointed, If new referees are appointed, the same proceedings shall be had as upon the first reference.

If there be a trial of the action by a jury, or by the court without a jury, the clerk of the court must give notice of the time and place of such trial to all persons owning or having an interest in any property within said assessment district for said improvement. Said notice shall be published in

the same manner and for the same time as the notice hereinbefore in this section required to be given by said clerk, and shall require all persons owning or having an interest in any property included within said assessment district for said improvement, to intervene in said action, and to appear at the trial thereof and introduce evidence relative to the compensation and damages to be awarded to the defendants therein. At any time within not less than one day prior to the trial, any person not a party to the action, having an interest in any property included within said assessment district, may intervene in the action, and, upon the trial thereof, may appear and introduce evidence relative to the compensation and damages to be awarded to the defendants therein. The cost of the publication of the notices required by this section shall be paid by the plaintiff, and allowed as costs in the action.

When a time has been appointed for hearing the report of the referees, or for the trial of the action, and notice thereof has been given by the clerk by publication as in this section provided, if the hearing or trial be postponed or continued by the court to any subsequent date, no such notice need be given by the clerk of the hearing or trial upon any such postponement or continuance. [Amendment approved April 21, 1909. Stats. 1909, p. 1039.]

§ 12. Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the costs allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint. The court shall allow to the referees, as costs to be paid by the plaintiff, a reasonable compensation for their services, the amount of which compensation shall be fixed by the court upon the hearing of the report, and their necessary expenses. [Amendment approved April 21, 1909. Stats. 1909, p. 1040.]

§ 13. An appeal may be taken from such interlocutory judgment within thirty days from the entry thereof, and from any order granting or denying a new trial within ten days after the entry thereof.

§ 14. The city council may, at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice; and if any of the assessments levied to pay the expense of the improvements, as hereinafter provided, shall have been actually paid in money at the time of such abandonment, the same shall be refunded to the persons by whom they were paid. If the proceedings be abandoned or the action dismissed no attorney's fees shall be awarded the defendants or either or any of them. [Amendment 1911.]

§ 15. Upon the entry of the interlocutory judgment, the city council shall order the city engineer, or if there be no city engineer, any civil engineer whom it may employ for that purpose, to make and deliver to the street superintendent, a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. Said diagram shall show the land to be taken for the proposed improvement, and also each separate lot, piece or parcel of land within the assessment district, and the dimensions of each such lot, piece, or parcel of land, and the relative location of the same to the proposed improvement.

§ 16. The city engineer shall deliver said diagram to the street superintendent, and shall indorse thereon the date of such delivery. The street superintendent upon receiving the said diagram shall proceed to assess the total expenses of the proposed improvement upon and against the lands, including the property of any railroad or street railroad, within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for completing said assessment for a period not exceeding ninety days additional. The total expense of the improvement so to be assessed shall include the amounts awarded to the defendants by the interlocutory judgment in the action for condemnation, together with their costs, the compensation and expenses of the referees, as allowed by the court, and all other costs of the plaintiff in such action, the expenses of making the assessment, and all expenses necessarily incurred by said city, in connection with the proposed improvement, for the publication of ordinances, posting and publication of notices, for maps, diagrams, plans, surveys, searches and certificates of title to the property to be taken, and all other matters incident thereto. [Amendment approved April 21, 1909. Stats. 1909, p. 1040.]

§ 17. The street superintendent shall make the said assessment in writing. Such assessment shall describe each lot, piece, or parcel of land assessed for said improvement, and shall designate each such lot, piece, or parcel of land with an appropriate number. The street superintendent shall also designate each such lot, piece, or parcel of land on said diagram, with the number corresponding with the number thereof in said assessment, and said diagram shall thereupon be attached to and become and be deemed to be a part of said assessment. Such assessment shall show the total sum to be raised thereby, as hereinbefore provided, and also the items of such total sum, and opposite each lot, piece, or parcel of land assessed, the amount assessed thereon, and the name of the owner thereof, if known to the street superintendent; or if the owner's name is unknown, the word "Unknown" shall be written instead of such name. Any error or mistake in the designation of the owner of any lot, piece, or parcel of land, or in the particulars of his interest therein, shall not affect the validity of the assessment.

§ 18. As soon as said assessment is completed the street superintendent shall file the same, with the diagram attached thereto and made a part thereof as aforesaid, with the clerk of the council, who shall give notice of such filing by publication for, at least, ten days in a daily newspaper published and circulated in the city, or if there be no such daily newspaper, by three successive insertions in a weekly newspaper so published and circulated. Said notice shall require all persons interested to file with said clerk their objections, if any they have, to the confirmation of said assessment, within thirty days after the date of the first publication of such notice, which date shall be stated in said notice.

§ 19. All objections shall be in writing and shall be filed with said clerk within the time prescribed in the notice required by section 18 hereof. The clerk shall, at the next regular meeting of the city council after the expiration of the time for filing objections, lay said assessment and all objections so filed with him, before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof

may be adjourned, and pass upon such assessment, and may confirm, modify, or correct said assessment, or may order a new assessment, upon which like proceedings shall be had, as in the case of an original assessment; or if there be no objections, the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment, and the action of the council upon such objections and assessment shall be final and conclusive in the premises.

§ 20. The clerk of the council shall thereupon deliver to the street superintendent the assessment as confirmed by the city council, with his certificate of such confirmation, and of the date thereof. The street superintendent shall thereupon record such assessment and diagram in his office, in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment-roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment-roll. Immediately upon such recording, the several assessments contained in such assessment-roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made.

§ 21. The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for nonpayment thereof, as hereinafter provided, demand of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked "'Paid by offset"; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money, and the assessments shall, on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money. In either case, as a condition of the offset, such person must execute to the city and deliver to the street superintendent duplicate receipts for such part of the amount due him under said interlocutory judgment as is offset against such assessments, penalties, and costs. One of said duplicate receipts shall be filed by the street superintendent in his office, the other shall be filed with the clerk of the superior court, and on such filing, the city shall be entitled to a satisfaction pro tanto of said interlocutory judgment.

§ 22. The street superintendent shall, upon the recording of said assessment, give notice, by publication for ten days in a daily newspaper, published and circulated in such municipality, or by three successive insertions in a weekly newspaper, so published and so circulated, that said assessment has been recorded in his office, and that all sums assessed therein are due and payable immediately, and that the payment of the said sums is to be made to him within thirty days after the date of the first publication, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto. When payment for any assessment is made, the street superintendent shall mark opposite such assessment, the word, "Paid," the date of payment, and the name of the person by or for whom the same is paid, and shall, if so requested, give

receipt therefor. On the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment-roll, and mark each such assessment "Delinquent," and add five per cent to the amount of each assessment delinquent.

§ 23. The street superintendent shall, within ten days from the date of such delinquency, begin the publication of a list of the delinquent assessments, which list must contain a description of each parcel of property delinquent, and opposite or against each description, the name of the owner as stated in the assessment-roll, and the amount of the assessment, penalty, and costs due, including the cost of advertising, which last shall not exceed the sum of fifty cents for each lot, piece, or parcel of land, separately assessed. The street superintendent shall append to and publish with said delinquent list a notice that unless each assessment delinquent, together with the penalty and costs thereon, is paid, the property upon which such assessment is a lien, will be sold at public auction at a time and place to be specified in the notice. The publication must be made for a period of ten days, in some daily newspaper published and circulated in the municipality, or for three weeks in a weekly newspaper so published and circulated. The time of sale must not be less than five days, nor more than ten days, after the expiration of the period of publication of said list, and the place of sale must be in, or in front of, the office of the street superintendent.

§ 24. At any time after such delinquency, and prior to the sale of any piece of property assessed and delinquent, any person may pay the assessment on such piece of property, together with the penalty, and costs then due, including the cost of advertising, if such payment is made after the first publication of the list of delinquent assessments. The street superintendent shall thereupon mark such assessment "Paid," as hereinbefore provided.

§ 25. On the day fixed for the sale, the street superintendent must, at the hour of 10 o'clock A. M. commence the sale of the property advertised, commencing at the head of the list, and continuing in the numerical order of lots or parcels of land until all are sold; provided, that he may postpone or continue the sale from day to day until all the property is sold. Each lot, piece or parcel of land separately assessed must be offered for sale separately, and the person who will take the least quantity of land, and then and there pay the amount of the assessment, penalty, and costs due, including fifty cents to the street superintendent for a certificate of sale, shall become the purchaser. In case there is no purchaser, for any lot, piece or parcel of land so offered for sale, the same shall be struck off to the municipality, as purchaser, and the city council shall appropriate out of the general fund of the treasury, the amount required for such purchase, and shall order the city treasurer to place the same in the special fund for such improvement. No charge shall be made for the certificate of sale when the municipality is the purchaser.

§ 26. After making the sale, the street superintendent must execute, in duplicate, a certificate of sale setting forth a description of the property sold, the name of the owner thereof, as given on the assessment-roll, that said property was sold for a delinquent assessment, (specifying the improvement for which the same was made), the amount for which such property was sold, the date of sale, the name of the purchaser, and the time when the purchaser will be entitled to a deed. The street superin-

tendent must file one copy of such certificate in his office, and deliver the other to the purchaser, or if the municipality is the purchaser, to the clerk of the council, who shall file the same in his office. On the filing of the copy of such certificate in the office of the street superintendent, the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property, as in this act provided. The street superintendent shall also enter on the assessment-roll, opposite the description of each piece of property offered for sale, a description of the part thereof sold, the amount for which the same was sold, the date of the sale, and the name of the purchaser.

§ 27. A redemption of any parcel of property sold for delinquent assessment may be made by any party in interest, at any time prior to the execution and delivery of a deed therefor, by paying to the street superintendent the amount for which the property was sold, and in addition thereto, ten per cent thereon if paid within three months from the date of sale; twenty per cent if paid within six months; thirty per cent if paid within nine months; forty per cent if paid within twelve months, or fifty per cent if paid at any time after twelve months. When redemption is made, the street superintendent shall note that fact on the duplicate certificate of sale on file in his office, and deposit the amount paid with the city treasurer, who shall credit the purchaser named in the certificate of sale with the said amount, and pay the same to such purchaser, or his assignee, upon the surrender of the certificate of sale, and upon satisfactory proof of assignment thereof, if any. When the municipality is the purchaser, the treasurer shall notify the clerk of the council of the redemption, and such clerk shall thereupon cancel the certificate of sale on file in his office.

§ 28. At any time after the expiration of twelve months from the date of sale, the street superintendent must execute to the purchaser, or his assignee, on his application, if such purchaser or assignee has complied with the provisions of this section, a deed of the property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof and the fact that no person has redeemed the property. The street superintendent shall receive from the applicant for a deed, one dollar for making such deed, unless the municipality is the purchaser, in which case no charge shall be made therefor. The purchaser or his assignee must, at least thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth a description of the property, that said property has been sold for a delinquent assessment (specifying the improvement for which the same was made), the amount for which it was sold, the amount necessary to redeem at the time of giving notice, and the time when such purchaser or assignee will apply to the street superintendent for a deed. If the said owner cannot be found, after due diligence, said notice must be posted in a conspicuous place upon said property, at least thirty days before the time stated therein, at which the application for a deed will be made. The person applying for a deed must file with the street superintendent an affidavit or affidavits showing that notice of such application has been given, as herein required, and if the notice was not served on the owner of the property personally, that due diligence was used to find said owner; which affidavit or affidavits must be filed by the street superintendent in his office. If redemption of the property is made after such affidavits are filed, and more than eleven months from the date of sale, the person making such redemption must pay, in addi-

tion to the other amounts required, three dollars for the service of notice and the making of such affidavits, which amount shall be paid over to the purchaser or his assignee in the same manner as other sums paid for redemption. No deed for any property sold for delinquent assessment shall be made until the purchaser or his assignee has complied with all the provisions of this section, and filed the proper affidavits with the street superintendent.

§ 29. The deed of the street superintendent shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee.

§ 30. The street superintendent shall, from time to time, pay over to the city treasurer all moneys collected by him on account of any assessments made under the provisions of this act. The city treasurer shall on receipt thereof, place the same in a special fund, designating such fund by the name of the improvement for which the assessment was made.

§ 31. As soon as there is sufficient money in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the amounts awarded to the defendants by the interlocutory judgment in the action of condemnation, or such parts thereof as have not been paid by offset against assessments, as hereinbefore provided, the said amounts shall be paid to the parties entitled thereto, or into court for their benefit. On satisfactory proof being made to the court of payment of the amounts awarded by the interlocutory judgment to the respective parties entitled thereto, or into court for their benefit, it shall direct the interlocutory judgment to be satisfied, and shall make and enter a final judgment, condemning the lands described in the complaint to the use of the plaintiff for the purposes specified in such complaint.

§ 32. In case of a deficiency in the fund for such improvement, the city council, in its discretion, may provide for such deficiency by an appropriation out of the general fund of the treasury, or by ordering a supplementary assessment to be made by the street superintendent upon the property in said assessment district in the same manner and form, and subject to the same procedure as the original assessment, and in the last named case, in order to avoid delay, the city council may advance such deficiency out of the city treasury and reimburse the treasury from the collections under such supplementary assessment. In case of a surplus in the fund for such improvement, the city council may order such surplus refunded pro rata to the parties who paid the assessments.

§ 33. The following words and phrases shall, where used in this act, have the following meanings:

(1) The term "improvement" includes all of the improvements mentioned in section 1 of this act.

(2) The terms "municipality" and "city" include all incorporated cities, cities and counties, and other corporations organized for municipal purposes.

(3) The terms "city council" and "council" include any body or board in which by law is vested the legislative power of any municipality.

(4) The terms "clerk" and "city clerk" include any person or officer who acts as clerk of said city council.

(5) The terms "treasurer" and "city treasurer" include any person or officer who has charge and makes payment of the city funds.

(6) The term "street superintendent" includes any officer or board whose duty it is by law to have the care or charge of streets or the improvement

thereof, in any city. In any city where there is no street superintendent, or no such board, the city council thereof is hereby authorized to appoint a suitable person to perform the duties imposed by this act on the street superintendent, and all the provisions hereof applicable to the street superintendent shall apply to the person so appointed.

(7) The terms "owner" and "any person interested" include the person owning the fee, or the person in whom, on the day any protest or petition is filed, the legal title to real property appears, by deeds duly recorded in the county recorder's office of the county in which said city is situated, or any person in possession of real property, as the executor, administrator, trustee under an express trust, guardian or other legal representative of the owner, or any person in possession of real property under a written contract of purchase thereof duly recorded, or any person in possession of real property, as lessee thereof under a lease duly recorded, which shall require such lessee to pay or discharge all assessments for street or other public improvements, that may be levied or assessed against such real property.

(8) The term "property of any railroad or street railroad" shall be deemed to include and shall include property owned or controlled by any person, firm or corporation, as a railroad, street railroad or interurban railroad right of way whether such right of way be owned or controlled in fee or as an easement or by virtue of a franchise or otherwise, also the roadbed, ties and rails located on such right of way; and such property shall be assessed and the assessment thereof enforced in the same manner and to the same effect as other lands and property in the assessment district. [Amendment 1911.]

§ 34. In case there is no daily or weekly newspaper published and circulated in the city, then such notices and delinquent lists as are herein required to be published in a newspaper shall be posted in three of the most public places in such city, for the length of time required herein for the publication of the same in a weekly newspaper. No publication or notice other than that provided in this act shall be necessary to give validity to any proceedings had thereunder.

§ 35. Proof of publication of any notice required by this act shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the same, setting forth the facts regarding such posting. It shall be the duty of any officer who is required by this act to have any notice published or posted, to obtain and file in his office the affidavit or affidavits in proof thereof; provided that his failure so to do shall not affect the validity of any proceedings under this act. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting.

§ 36. This act shall in no wise affect an act entitled, "An act to provide for laying out, opening, extending, widening, straightening, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose," approved March 6, 1889, or amendments thereto, or any other acts on the same subject, or apply to proceedings had thereunder, but it is intended to and does provide an alternate system of proceedings for making the improvements provided for by this act; and it shall be within the discretion of the city council or any municipality to proceed in making such improvements, either under the pro-

visions of this act, or under the provisions of such other acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict with the provisions hereof shall be void and of no effect as to the proceedings commenced under the provisions of this act. The election of the city council to proceed under the provisions of this act shall be expressed in its ordinance of intention to order the work done.

§ 37. The provisions of this act shall be liberally construed to promote the objects thereof. This act may be designated and referred to as the "Street Opening Act of 1903," and shall take effect and be in force upon its passage and approval.

The amendatory act of April 21, 1909, contained also the following: "§ 11. Any proceeding or action for any improvement, such as is provided for in this act, or in said act to which this act is amendatory, already commenced and pending at the time this act takes effect, under or by virtue of any ordinance of intention theretofore passed, shall, from the stage of any such proceeding or action already commenced and in progress at the time this act takes effect, be continued under the provisions of this act. Any such proceeding or action shall then be continued and conducted under the provisions of this act, with full force and effect in all respects from the stage of such proceeding or action at and from the taking effect of this act; and from the taking effect of this act all proceedings theretofore had for any such improvement, and all proceedings theretofore had or taken in any such action, are hereby ratified, confirmed, and made valid, and it shall not be necessary to renew or conduct over again any such proceedings or actions, commenced prior to the taking effect of this act."

II. TEXT OF THE CHARTER PROVISIONS.

1. Alameda, p. 1111.
2. Berkeley, p. 1111.
3. Eureka, p. 1112.
4. Fresno, p. 1112.
5. Grass Valley, p. 1112.
6. Long Beach, p. 1113.
7. Los Angeles, p. 1114.
8. Modesto, p. 1116.
9. Monterey, p. 1117.
10. Napa, p. 1118.
11. Oakland, p. 1119.
12. Palo Alto, p. 1121.
13. Pasadena, p. 1121.
14. Richmond, p. 1123.
15. Riverside, p. 1123.
16. Sacramento, p. 1125.
17. Salinas City, p. 1125.
18. San Bernardino, p. 1125.
19. San Diego, p. 1126.
20. San Francisco, p. 1126.
21. San Jose, p. 1157.
22. San Luis Obispo, p. 1160.
23. Santa Barbara, p. 1162.
24. Santa Cruz, p. 1163.
25. Santa Monica, p. 1164.
26. Santa Rosa, p. 1164.
27. Stockton, p. 1171.
28. Vallejo, p. 1171.
29. Watsonville, p. 1185.

1. Alameda.

(Stats. 1907, p. 1051.)

Article II, section 17. Subject to the provisions and restrictions in this charter contained, the council shall have power:

Twenty-six: To provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof; to determine what work shall be done or improvements made at the expense in whole or in part, of the owners of the adjoining contiguous or proximate property, or others benefited thereby, and to provide for the manner of making and collecting assessments therefor.

Article XII, section 7. The improvement, widening and opening of streets, the planting of trees, and all other matters not specified in this charter, shall be done, and assessments therefor levied, in conformity with and under the authority conferred by general law.

2. Berkeley.

(Stats. 1909, p. 1208.)

Section 49. As the legislative organ of the city, the council, subject to the provisions and restrictions of this charter, shall have power:

(43) To order the whole or any part of any street, avenue, lane, alley, court or place within the city of Berkeley to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or re-macadamized, graveled or regraveled, piled or repiled, capped or recapped; sewered or resewered, and to order sidewalks, manholes, culverts, cesspools, gutters, tunnels, curbing and crosswalks to be constructed therein, and to order breakwaters, levees or walls of rock or other material to protect the same and also any other improvement therein; to provide for the care of shade trees planted therein and to cause shade trees to be planted, set out and cultivated therein; and also to order drainage or sanitary sewers or storm-water sewers to be constructed on or through private property.

"Whenever, in the judgment of the council or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessments on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto."

(44) To order the opening, extending, widening, straightening or closing of any street, lane, alley, court or public place within the city or over tide lands and lands covered by the waters of San Francisco bay within the city, and to condemn and acquire any and all property necessary or convenient for that purpose.

"Whenever in the judgment of the council or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto, except that all the duties of the commissioners and secretaries shall be performed by or under the direction of the commissioner of public works of the city who shall receive no compensation therefor."

3. Eureka.

(Stats. 1895, p. 351, sec. 43.)

The council shall have power to pass ordinances:

1. To establish or alter the grades of, and to open, lay out, alter, extend, close, straighten, widen, or otherwise improve or regulate streets, alleys, lanes and sidewalks upon the same; determine the width of sidewalks and streets, and the grade of the same, and to provide for acceptance of the streets when constructed and completed in accordance with such regulations as the council may adopt. Also to open, lay out, construct, alter, widen, extend, repair, and vacate walks, cross-walks, avenues, and thoroughfares in or over any plaza, park, or grounds belonging to or under the control of the city.

5. To establish a general and comprehensive system of sewers in the city, and to regulate the building and repairing thereof.

6. To provide for and regulate street pavements, crosswalks, curbstones, grades, gutters, sewers, and cleaning and watering of the streets.

41. To make real estate in said city liable for the construction of sidewalks, crossings, and all other street improvements adjacent thereto, and provide for the forced sale thereof for such purposes.

Section 191. All improvements, actions, proceedings, matters, and things not otherwise provided for in this charter shall be taken, had, and conducted under, and in pursuance of the provisions of the laws of the state of California applicable thereto, in force at the time such improvements, actions, proceedings, matters, and things are taken and had.

4. Fresno.

(Stats. 1901, p. 832.)

Section 28. The board of trustees shall have power:

Fifth—To lay out, extend, alter or close streets and alleys; provide for the grading, draining, cleaning, repairing, widening, lighting, or otherwise permanently improving the same, and for the construction, repair, regulation and preservation of sidewalks, bridges, drains, curbs, gutters and sewers, and to prevent or remove obstructions thereto or to any part thereof, and to provide for the numbering of houses.

Section 48. He [the superintendent of streets] shall perform such other duties as are hereinafter specified, or as the board may require of him; and he shall have the power and shall perform the duties required of the superintendent of streets by the act of the legislature of the state of California, entitled "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, or by any acts amendatory thereof, supplementary thereto, or substituted therefor."

Section 274. All acts of the legislature relating to the city, and all city ordinances, resolutions and other regulations now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority. . . . .

5. Grass Valley.

(Stats. 1893, p. 639.)

Article VII, section 1. The trustees shall have power to lay out, open, and keep open, alter, grade, regulate, and repair the streets, alleys, and side-

walks of the city, and sprinkle and light the same; to provide for, construct, regulate, and keep in repair a system of sewerage and drainage for the city, and provide for the making of street crossings where they may deem proper; to construct bridges where necessary, and provide for the protection of the same.

Article VII, section 2. The board of trustees may, by ordinance, declare the necessity of the construction or repair of the sidewalks of the city and prescribe the character thereof, and when such ordinance is passed the owner or occupant of the lot may proceed to do the work specified in front of such lot or part of lot so owned or occupied, under the direction and control of the said board of trustees, and within such time as may be specified in such ordinance. Whenever such work shall not be done by such owner or occupant within the time prescribed said board of trustees may levy an assessment upon all such lots where such work has not been done, sufficient in amount to defray the expense of such work, which assessment shall be levied and collected by suit in the same manner and under the same provisions of law whereby city taxes now are or may hereafter be collected; and every such assessment shall become and hereby is declared to be a lien upon said lots severally to attach at the date of the publication of any such ordinance.

6. Long Beach.

(Stats. 1907, p. 1176.)

Article I, section 3. The said city shall continue vested with all the property of every kind belonging to it and shall have the power:

Tenth—To establish and change the grade and to lay out, open, extend, widen, change, vacate, pave, repave, gravel, oil, surface, resurface and improve streets, alleys, sidewalks, crossings and other highways and public squares and places and to make provision for cleaning, sprinkling and oiling the same.

Thirteenth—And to levy assessments upon property to pay for the improvement of streets and other public improvements, and to collect the same. . . . .

Article VII, section 3. The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city council relating to:

The advertising for, and inviting of proposals or bids for doing any work ordered by the city council to be done in or upon any street, avenue, lane, alley, court or place, or in the construction of any sewer or drain, ordered by the city council in or over the right of way granted or acquired for such purpose;

The examining, considering and declaring of such proposals or bids;

The awarding, letting and reletting of contracts for doing any of said work so ordered, the giving notice of such award, the rejection of such proposals or bids for doing such work, and the granting of extensions of time for the completion thereof by the contract therefor;

The approval and fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work, and the fixing of the time in which such work shall be commenced and completed.

The board shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor

relating to the approval of the awards of contracts for any of the work mentioned in this section.

The board of public works shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon any commission provided for by law to assess the benefits, damages and costs incident to a proposed change of grade of any public street, alley, lane or court.

The president of the board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval and fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work.

The secretary of the board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city clerk or the clerk of the city council relating to:

The receipt, care and custody of proposals and bids for doing any of the work mentioned in this section;

The care and custody of all checks and bonds accompanying such proposals or bids.

Article VIII, section 1. Except as provided herein, the general law of the state of California relative to the improvement of, and work upon streets, lanes, alleys, courts, places and sidewalks, including the construction of sewers, establishing of and changing grades of streets, and providing for the laying out, opening, widening, straightening or closing up, in whole or in part, of any street, square, lane, alley, court or place within the municipality, and to condemn and acquire any and all land and property necessary and convenient for that purpose; and for providing a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within the municipality, and to provide for the payment of such bonds; and providing for the planting, maintenance and care of shade trees upon streets, lanes, alleys, courts, and places within the municipality, and of hedges upon the lines thereof, and for the eradication of weeds within the city limits, now in force, or which may hereafter be adopted by the legislature of this state, is hereby made a part of this charter, and shall govern the city council in such matters.

7. Los Angeles.

(Stats. 1889, p. 455.)

Article I, section 2. The said corporation shall have the power:

8. To lay out, open, extend, widen, improve, or vacate, pave, and repave streets and alleys, sidewalks and crossings, and other highways.

11. To levy assessments upon property to pay for the improvement of streets and other public improvements, and to collect the same. . . . .

Articles XIV, XV, XVI, XVII, prescribing a procedure for street work, were repealed in 1903. See Stats. 1903, p. 572.

Section 144. (Amendment 1905, p. 983.) The board (of public works) shall, from and after the first organization thereof, be the successor in office of the street superintendent and of the superintendent of buildings, and shall have all the powers and perform all the duties that are now or may hereafter be conferred or imposed by law upon said officials, respectively, and

the board shall perform such other duties as are herein or may be, by ordinance, imposed upon it.

Section 145. (Amendment 1905, Stats. 1905, p. 983.) (a) The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city council relating to:

1. The advertising for, and inviting proposals or bids for doing any work ordered by the city council to be done in or upon any streets, avenues, lanes, alleys, courts or places, or in the construction of any sewer or drain, ordered by the city council in or over the right of way granted or acquired for such purpose;

2. The examining, considering, and declaring of such proposals or bids;

3. The awarding, letting, and reletting of contracts for doing any of said work so ordered, the giving notice of such award, the rejection of proposals or bids for doing such work, and the granting of extensions of time for the completion thereof by the contractor therefor;

4. The approval and the fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work, and the fixing of time within which such work shall be commenced and completed.

The board shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval of the award of contracts for any of the work mentioned in this section.

The board of public works shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon any commission provided for by law to assess the benefits, damages and costs incident to a proposed change of grade of any public street, alley, lane, or court.

(b) The president of the board of public works shall have and exercise all of the powers and duties that are now or hereafter may be conferred or imposed by law upon the mayor relating to the approval and fixing of the amount of bonds required to be given by contractors prior to, or at the time of, executing contracts for such work.

(c) The secretary of the board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city clerk or clerk of the city council relating to;

1. The receipt, care and custody of proposals or bids for doing any of the work mentioned in this section.

2. The care and custody of all checks and bonds and accompanying such proposals or bids.

Section 146. (Amendment 1905, Stats. 1905, p. 984.) The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the city council:

1. Of all public ways, streets, avenues, boulevards, lanes, alleys, places and courts, now open or which may hereafter be opened in the city of Los Angeles; of the manner of their use and occupation; of all work and improvements done in, on, over or under the same, and of all excavations made in or under the same.

Article III, section 36a. (Amendment 1909, Stats. 1909, p. 1306.) The council shall have power, by ordinance, to provide for the planting, maintenance, or care of shade and ornamental trees in streets and other public places, and for the removal of unsightly and dead trees therefrom; and to

make the cost thereof a lien and charge upon the abutting property, and to make provision for the enforcement of such lien.

8. Modesto.

(Stats. 1911.)

Article III, section 4. Without denial or disparagement of other powers held under the constitution and laws of the state, the city of Modesto shall have the right and power:

(14) To exercise the right of eminent domain, for the purpose of acquiring real and personal property of every kind for any public use.

(20) To establish and change the grade and lay out, open, extend, widen, change, vacate, pave, repave, or otherwise improve all public streets and highways and public places, construct sewers, drains and culverts, to plant trees, construct parking, and to remove shrubs and weeds; to levy special assessments to defray the whole or any part of the cost of such works or improvements. Also to provide for the repair, cleaning and sprinkling of such streets and public places.

(35) To compel the owner or occupant of buildings or grounds to remove dirt, rubbish and weeds therefrom and from the alley and sidewalk thereof and in his default to authorize the removal or destruction thereof by some officer of the city at the expense of such owner or occupant, and to make such expense a lien upon such buildings or grounds.

(59) To require every railroad company to keep the streets in repair between the tracks, and along and within the distance of two feet upon each side of the tracks occupied by the company, and to sprinkle the same.

Article III, section 30. (7) No action providing for any specific improvement or the appropriation or expenditure of any public money, except a sum less than two hundred dollars; for the appropriation, acquisition, sale or lease of public property; for the levying of any tax or assessment; for the granting of any franchise; for establishing or changing fire limits; or for the imposing of any penalty, shall be taken except by ordinance; provided, that such exceptions be observed as may be called for in cases where the council takes action in pursuance of a general law of the state.

Article III, section 42. No officer or employee of the city shall be directly or indirectly interested in any contract, work or business of the city, or in the sale of any article, the expense, price or consideration of which is paid for from the treasury or by assessment levied by any act or ordinance; nor in the purchase or lease of any real estate or other property belonging to the city or which shall be sold for taxes or assessments or by virtue of legal process at the suit of the city. No officer or employee of the city shall be in the employ of any public service corporation in the city or of any person having any contract with the city or of any grantee of a franchise granted by the city.

Any contract or agreement made in contravention of this section shall be void.

Any violation of the provisions of this section by such officer or employee of the city shall be deemed a misdemeanor.

The council shall enforce the provisions of this section by appropriate legislation.

Article III, section 59. In the erection, improvements and repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, or water front, or in or about embankments or other

works for protection against overflow and erosion, and in furnishing any supplies and materials for the same, or for any other use by the city, when the expenditure required for the same exceeds the sum of two hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after advertising for sealed proposals for the work contemplated, in five successive issues of the official newspaper of the city of Modesto. Such notice shall distinctly and specifically state the work contemplated to be done; provided, however, the council may reject any and all bids and re-advertise for bids, or provide for the work to be done by the department of public works. In case no bid is received, the council may likewise provide for the work to be done by the department of public works.

Article III, section 62. The maximum time of labor or service required of any laborer, workman or mechanic employed upon any municipal work, whether so employed directly by the city and its officers, or by a contractor or subcontractor, shall be eight hours during any one calendar day.

Article III, section 64. If at any time it shall be found that the person to whom a contract has been awarded has, in presenting any bid or bids, colluded with any other party or parties for the purpose of preventing any other bid being made, then the contract so awarded shall be null and void, and the council shall advertise for a new contract for said work, or provide for such public work to be done by the department of public works.

9. Monterey.

(Stats. 1911.)

Section 73. As the legislative organ of the city, the council, subject to the provisions and restrictions of this charter, shall have power:

(16) To compel the owner or occupant of buildings or grounds to remove dirt, rubbish and weeds from the sidewalk immediately in front thereof and in his default to authorize the removal or destruction thereof by some officer of the city at the expense of such owner or occupant, and to make such expense a lien upon such buildings or grounds.

(41) To establish or change the grade of any street or public place.

(42) To order the whole or any part of any street, avenue, lane, alley, court or place within the city of Monterey to be graded, or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, sewered or resewered, and to order sidewalks, manholes, culverts, cesspools, gutters, tunnels, curbing and cross-walks to be constructed therein, and to order breakwaters, levees or walls of rock or other material to protect the same and also any other work or improvement therein; to provide for the care of shade trees planted therein and to cause shade trees to be planted, set out and cultivated therein; and also to order drainage or sanitary sewers or storm water sewers to be constructed on or through private property.

Whenever, in the judgment of the council, or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessments on private property, the general laws of the state of California in force at the time of the improvement shall govern and control and all proceedings shall be in conformity thereto.

(43) To order the opening, extending, widening, straightening, or closing of any street, lane, alley, court or public place within the city or over tide

lands and land covered by the waters of Monterey Bay within the city, and to condemn and acquire any and all property necessary or convenient for that purpose.

Whenever, in the judgment of the council or of the people the cost and expense of any of the foregoing improvements is to be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto, except that all the duties of the commissioners shall be performed by or under the direction of the commissioner of public works of the city, who shall receive no compensation therefor.

(46) Whenever any street or portion of a street shall be abandoned or closed by ordinance, to convey by deed such street or portion of street so abandoned or closed, to the party or parties who may be entitled thereto.

(50) To require every owner or lessee of railroads in said city to keep the streets in repair between the tracks, and along and within the distance of two feet upon each side of the tracks occupied by the owner or lessee.

Section 90. In the erection, improvement or repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, bays or water front, or in or about embankments or other works for protection against overflow and erosion, and in furnishing any supplies and materials for the same, or for any other use by the city, when the expenditure required for the same exceeds the sum of five hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after advertising for sealed proposals for the work contemplated for five consecutive days in the official newspaper. Such notice shall distinctly and specifically state the work contemplated to be done. Provided, however, the council may reject any and all bids, if deemed excessive, and re-advertise for bids, or provide for the work to be done by the department of public works. In case no bid is received, the council may likewise provide for the work to be done by the department of public works.

Section 94. The maximum time of labor or service required of any laborer, workman or mechanic employed upon any municipal work, whether so employed directly by the city and its officers, or by a contractor or subcontractor, shall be eight hours during any one calendar day.

Section 96. If at any time it shall be found that the person to whom a contract has been awarded has, in presenting any bid or bids, colluded with any other party or parties for the purpose of preventing any other bid being made, then the contract so awarded shall be null and void, and the council shall advertise for a new contract for said work, or provide for such public work to be done by the department of public works.

10. Napa.

(Stats. 1893, p. 642.)

Section 17. (Amendment, Stats. 1903, p. 689.) The city council shall have power:

Third—To establish, build and repair bridges; to establish, lay out, alter, keep open, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city, and to drain, sprinkle, oil and light the same; to remove all obstructions therefrom; to establish the grades thereof and enforce conformity thereto; to grade, pave, macadamize, gravel and curb the same, in whole or in part, and to construct

gutters, culverts, sidewalks, and cross-walks therein, or upon any part thereof, and generally to manage and control all such bridges, streets, lanes, alleys, squares, highways and places; to establish, construct and maintain drains and sewers; to provide for the opening and closing and for the repair of drawbridges.

Section 20. All streets, lanes, alleys, places, and courts in said city now open or dedicated, or which may hereafter be opened or dedicated to public use, and of which the grade and width have been legally established, are and shall be open public streets for the purposes of this section; upon such open public streets in said city all "improvements," as defined in the act of the legislature of the state of California entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, shall be done by authority of the council, and the expenses thereof paid under and in accordance with the provisions of the said act, and of any acts which may be passed in amendment thereof, or supplemental thereto, or in substitution therefor, except that when the work or improvement ordered is a sewer, the city shall pay out of the proper fund all the cost of constructing such sewer over fifty cents per lineal foot of the lots and lands fronting on such sewer; and the council is vested with jurisdiction to change the grades of said streets, lanes, alleys, places, and courts, and fix the width thereof; the council is also invested with jurisdiction to vacate any of said streets, lanes, alleys, places, and courts, on the consent in writing of not less than two-thirds of the frontage on such street, lane, alley, place, or court to be vacated.

Section 21. The council is empowered to open, straighten, extend, and widen streets, and to modify the boundaries thereof, and to determine the property benefited thereby, and to assess the benefits and damages thereof, and to assess the expenses of such improvement upon the property benefited; but all such proceedings shall be conducted under the provisions of the laws of the state of California, applicable thereto, in force at the time any such improvement is ordered.

11. Oakland.

(Stats. 1911.)

Article IX, section 49. Without denial or disparagement of other powers now held by, or that may hereafter be given to the city under or by the constitution or the laws of the state, the city of Oakland shall have power:

(17) To provide for the planting, maintenance or care of shade and ornamental trees in streets and other public places, and for the removal of unsightly and dead trees therefrom; and to make the cost thereof a lien and charge upon the abutting property, and to make provision for the enforcement of such lien.

(18) To require the owners of real property in the city to remove grass, weeds, rubbish or obstructions from the public sidewalks in front of their property, and, upon their default, to cause such work to be done and the cost thereof to be made a lien and charge upon such property, and to make provision for the enforcement of such lien.

(19) To require the owners of real property fronting upon any street, lane, alley or other public place, in which there are sewers, water or gas mains or other mains or conduits, to connect therewith their several premises (allowing not more than fifty feet of frontage to any premises), before such street, lane, alley or other public place, or the portion thereof upon

which such property fronts, is paved or otherwise improved, and upon their default, to cause such connections to be made and to make the cost thereof a lien and charge upon the property so connected, and to make provision for the enforcement of such lien.

(20) Except as otherwise provided in this charter, or in the constitution of the state of California, to regulate and control, for any and every purpose, the use of the streets, lanes, alleys, courts and sidewalks, and other public places of the city.

(45) To establish or change the grade of any street or public place.

(46) To order the whole or any part of any street, avenue, lane, alley, court or public place within the city of Oakland to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, sewered or resewered, and to order sidewalks, manholes, culverts, cesspools, gutters, tunnels, curbing and cross-walks to be constructed therein or thereon, and to order breakwaters, levees or walls of rock or other material to protect the same and also any other work or improvement therein or thereon; to provide for the care of shade trees planted therein or thereon, and to cause shade trees to be planted, set out and cultivated therein or thereon, and also to order drainage or sanitary sewers or storm water sewers to be constructed on or through private property.

Whenever, in the judgment of the council, the cost and expense of any of the foregoing improvements should be paid by special assessments on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto.

(47) To order the opening, extending, widening, straightening or closing of any street, lane, alley, court, or public place within the city or over tide lands or lands within the city covered by the waters of the estuary of San Antonio or of any bay, and to condemn and acquire any and all property necessary or convenient for that purpose.

Whenever, in the judgment of the council the cost and expense of any of the foregoing improvements should be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto, except that no commissioner, secretary or attorney shall be appointed, and that all the duties imposed on commissioners, secretaries and attorneys under the general law shall be performed under the direction of the commissioner of streets and the city attorney of the city, neither of whom shall receive compensation therefor, provided that nothing contained in this subdivision shall be construed as affecting any pending proceeding.

To make provision for the deposit with the treasurer, by any person, firm or corporation desiring to open any sidewalk, street, alley, lane, court, park or other public place, for the purpose of laying or removing any pipe, wire, conduit, sewer or other structure therein, of moneys sufficient to cover the cost of refilling and covering such opening and restoring the sidewalk, street, lane, alley, court, park or other public place to the condition in which it was before such opening was made, and to provide for the doing of such work at the expense of the person, firm or corporation making such opening, such expense to be paid out of such deposit.

(50) Whenever any street or portion of a street shall be abandoned or closed by ordinance, to convey by deed such street or portion of street so abandoned or closed, to the owners of the lands adjacent thereto in such

wise as the council shall deem that equity requires. But the council shall have no power to convey by deed or otherwise without adequate compensation any street or portion of a street which shall have been acquired by the city by deed from any person or persons whatever. And this section shall not be construed as empowering or authorizing the council to close any street or portion thereof merely by the consent of owners of lands adjacent thereto and when the public convenience does not so require.

12. Palo Alto.

(Stats. 1909, p. 117.)

Article II. The city of Palo Alto shall have and exercise the following powers:

11. To establish and change the grade and lay out, open, extend, widen, change, vacate, pave, repave, or otherwise improve all public streets and highways and public places, construct sewers, drains and culverts, to plant trees, construct parking, and to remove shrubs and weeds; to levy special assessments to defray the whole or any part of the cost of such works or improvements. Also to provide for the repair, cleaning and sprinkling of such streets and public places.

Article V, section 2. The board of public works shall have and exercise the powers and perform the duties herein enumerated, to wit:

3. To establish and change the grade and to lay out, open, extend, widen, change, vacate, pave, repave, or otherwise improve all public streets and highways and public places, to construct sewers, drains, culverts thereon, to plant trees, construct parking and remove shrubs and weeds. Also to provide for the repair, cleaning and sprinkling of such streets and public places.

Article V, section 3. Whenever any street work or other improvement is to be done or performed and the cost of the whole or any portion thereof is to be paid by any special assessment levied upon property, all such proceedings shall be had and carried on by the council upon the recommendation of the board of public works.

13. Pasadena.

(Stats. 1901, p. 884.)

Article I, section 3. The said city shall continue vested with all the property of every kind now belonging to it and shall have the power:

Fifteenth. (Amendment, Stats. 1909, p. 1199.) . . . . And to levy and collect, or cause to be levied and collected, assessments upon property to pay for the acquiring, grading, regrading, laying out, opening, widening, extending and improving of rights of way, streets, alleys, sidewalks, crossings, and other highways and public squares and places, for the construction of sewer, water, storm water, gas and other pipes, mains and conduits therein; for the planting, maintenance and care of trees and shrubbery therein, for the removal of grass, weeds or obstructions therefrom, and for the removal from lands or lots of weeds, rubbish or other material.

Article IX, section 1. Whenever the city council shall deem it expedient to establish the grade of the whole or any part of any street, avenue, lane, alley, court, or place in said city, the same shall be done by ordinance.

Section 2. Whenever the city council shall deem it expedient to alter the established grade of the whole or any part of any street, avenue, lane, alley, court, or place in said city, said council shall by ordinance declare its intention to alter such established grade, in which ordinance must be specified the grade that is proposed to be established; and shall publish such ordinance at least ten days in a daily newspaper published and circulated in the city of Pasadena.

Section 3. Within ten days after the first publication of such ordinance, any owner of property fronting on such street, or part thereof whereon said change is proposed, may make and file with the city clerk a written remonstrance against the proposed change of grade, setting forth in detail the damage which will arise to him by reason of the proposed change of grade, and thereupon the same shall not be further proceeded with or made without compensation to such owner for any damage which may be occasioned to him by said change. The said damage shall be ascertained, if possible, by agreement between such owner and the council, and in case such agreement cannot be reached with such owner, the amount of damage justly payable to such owner shall be determined by an action in the name of the city against him, and in case there is remonstrance from more than one, all said remonstrants may be joined as defendants in said action and all of their damages determined therein.

Section 4. The cost of providing cross-walks, and of improving all intersections of streets, including the cost of constructing sewers therein, and of space included between the center line of the street to be improved and the prolongation of the side lines of any street forming a junction with such street to be improved, to such center line, except the cost of constructing sewers therein, shall be paid out of the general or other appropriate fund of the city, and shall not be included in the special assessment for the proposed work. When a sewer is to be constructed within said last mentioned space, half of the cost of said sewer shall be assessed against the property abutting against the said space extended, and one-half of said cost shall be paid out of the general or other appropriate fund of the city.

Section 5. (Amendment, Stats. 1909, p. 1200.) Except as otherwise herein or by ordinance of the city provided, the general law or laws of the state of California now in force, or which may hereafter be adopted by the legislature of this state, providing for the laying out, opening, extending, widening, straightening, or closing up, in whole or in part, of any street, square, lane, alley, court or place within municipalities, for condemning and acquiring any and all land and property necessary or convenient for such purposes, for the paving, curbing, guttering, sidewalking and other improvements of streets, squares, lanes, alleys, courts or places, for the construction of sewer, water, storm water or other mains, ditches, pipes or conduits, for the planting, maintenance or care of shade trees or shrubbery upon or along streets, lanes, alleys, courts. rights of way and places within municipalities, and for the eradication of weeds and removal of rubbish within municipalities, and for the levying and collecting of assessments upon property for the doing of said work or carrying out of said purposes, and for the issue of improvement bonds to represent such assessment, are hereby made a part of this charter; provided, however, that the council shall have power at any time by ordinance to abandon or re-adopt the modes or system so provided for, or relative to, or adopt or provide or change different modes or systems for, or relative to, said

work or purposes, or any of them, and for the levying and collection of assessments upon property for the doing of said work or carrying out of said purposes, and for the issue of improvement bonds to represent assessments for the cost of doing said work or carrying out of said purposes.

Section 6. (Amendment, Stats. 1909, p. 1200.) Upon a petition of the owners of a majority of the frontage abutting upon any street or part thereof, the council shall have power by ordinance to require, or provide, or adopt general law or laws, for the planting, maintenance or care of grass plots between the sidewalk and roadway in such street or part thereof, and to make the cost thereof a lien and charge upon the abutting property, and to make provision of enforcement of such lien by the sale of property or otherwise.

Section 7. (Amendment, Stats. 1909, p. 1200.) The council shall have power by ordinance to require or provide for the removal of grass, weeds or other obstruction from the sidewalks, parkings or streets, and to make the cost thereof a lien or charge, upon the abutting property and to make provision for the enforcement of such lien by the sale of property or otherwise.

14. Richmond.

(Stats. 1909, p. 1263.)

Article II, section 1. The city of Richmond shall have and exercise the following powers:

11. To establish and change the grade and lay out, open, extend, widen, change, vacate, pave, repave or otherwise improve all public streets and highways and public places, construct sewers, drains, bridges, conduits, culverts and subways thereon or thereunder, to plant trees, construct parking, and to remove weeds; to levy special assesments to defray the whole or any part of the cost of such works or improvements. Also to provide for the repair, cleaning and sprinkling of such streets and public places.

15. Riverside.

(Stats. 1907, p. 1277.)

Section 15. The mayor and common council of said city shall have power:

37. To build and repair bridges; to establish, lay out, alter, keep open, close, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city; to drain, sprinkle, oil and light the same; to remove all obstructions therefrom; to establish the grades thereon; to grade, pave, macadamize, gravel and curb the same, in whole or in part, and to construct gutters, culverts, sidewalks and cross-walks thereon or on any part thereof; to cause to be planted, set out and cultivated, shade trees therein; and generally, to manage and control all such highways and places; and in the exercise of the powers herein granted, to expend, in their discretion, the ordinary annual income and revenue of the municipality in payment of the costs and expenses of the whole or any part of such work or improvement.

49. To make provision for cleaning, sprinkling and oiling streets, alleys, sidewalks, crossings and highways, and to provide for the payment of the expense thereof as to any or all of such streets, alleys, sidewalks, crossings and highways, in whole or in part, by a charge and lien upon the lands fronting upon the places so cleaned, sprinkled and oiled.

Section 253. Except as provided herein and unless otherwise provided by ordinance, the general law of the state of California relative to the improvement of, and work upon streets, lanes, alleys, courts, places and sidewalks, including the construction of sewers and providing for the laying out, opening, extending, widening, straightening or closing up in whole or in part of any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary and convenient for that purpose; and for providing a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and to provide for the payment of such bonds; and providing for the planting, maintenance and care of shade trees upon streets, lanes, alleys, courts and places within municipalities, and of hedges upon the lines thereof, and for the eradication of weeds within city limits, now in force, or which may hereafter be adopted by the legislature of this state is hereby made a part of this charter, and shall govern the council in such matters; provided, the council is hereby given power to enact ordinances providing for, and having the effect as long as such ordinances shall remain in force, of repealing all, any, or any portion of any such general laws, as far as the same shall relate to the city of Riverside, and substituting in place thereof other measures, provisions and regulations, relating to similar matters; and, provided, the council is hereby given power to enact ordinances providing other and different measures, provisions and regulations relating to any, all or any portion of the matters covered in such general laws, and in any proceedings relating to any of said matters to decide and provide in the resolution or ordinance ordering or initiating said proceedings, whether said proceedings or work shall be conducted under general laws, under general laws as amended by said ordinances, or entirely under said ordinances. A repeal of any such ordinance will revive the operation of any such general law so repealed in whole or in part, with amendments thereto, provided said law be still in force in the state.

Section 254. The council shall have power by duly enacted ordinance to provide rules and regulations for having sewers, drains and conduits laid in the streets, alleys and places of the city, under private or public contract, to require that the owner of any property which has not contributed to the payment of the cost and expenses of such construction, must, before being allowed to connect with and use such sewers, drains and conduits, pay into the city treasury or to some designated officer, the proper portion of such cost and expense which such property should have borne had it participated in said payment, with interest thereon to said date, or in lieu thereof a stated sum of money. The ordinance may provide that the money so collected shall be paid into the sewer fund, or returned to the present owners of the property participating in such original cost, pro rata.

Section 255. The council shall have power to cause an estimate to be made and a bid submitted on behalf of the city by the city engineer and the superintendent of streets on any work provided for in this article. Said bid shall be in regular form but no bond, certified check or other deposit or security shall be required of the city. The contract for said work may be awarded to the city if the bid of said city is the lowest, or to the next highest responsible bidder at the option of the council. No bond shall be required of the city, but the contract shall be signed in regular form. The superintendent of streets shall have charge of the execution of any such contract and careful records of cost must be kept. The city may do any such work on application of a petition signed by the owners of a majority of the frontage of the property fronting on any proposed improvement, even

though no bid was submitted by said city, or without said petition if the council deems that the city can do such work at less cost than lowest bid therefor. Any such work may be done by day labor, or sublet by contract, or both. Assessments for such work shall be collected as designated by the council.

Section 256. In all proceedings under the general laws of the state the city engineer and the superintendent of streets, respectively, shall perform the same duties as prescribed in said laws.

16. Sacramento.

(Stats. 1893, p. 547.)

Section 25. The board of trustees shall have power:

Fifth—To lay out, extend, alter, or close streets and alleys, provide for the grading, draining, cleaning, repairing, widening, lighting, or otherwise permanently improving the same, and for the construction, repair, regulation, and preservation of sidewalks, bridges, drains, curbs, gutters, and sewers, and to prevent or remove obstructions thereto or to any part thereof, and to provide for the numbering of houses.

Twenty-ninth—To make real estate in said city liable for the construction of sidewalks, crossings, and all other street improvements adjacent thereto, and provide for the forced sale thereof for such purposes.

17. Salinas City.

(Stats. 1903, p. 599.)

Section 19. Subject to the provisions, limitations and restrictions in this charter contained, the council shall have power:

4. To lay out, open, widen, extend, alter and close streets, avenues, alleys, lanes, roads, courts and public places within said city, and to fix and alter their official grades; to grade, pave, curb, sidewalk, sewer, drain and otherwise improve the same; to provide for the repair, cleaning, watering and lighting thereof; to manage and control such streets, roads, highways and public places and to regulate the use thereof; to regulate or prohibit the placing or maintaining of trees, hitching posts, signs, awnings and other obstructions therein, and to remove obstructions therefrom.

18. San Bernardino.

(Stats. 1905, p. 940.)

Section 40. The mayor and common council shall have power to pass ordinances, not in conflict with the constitution of this state, or the United States, or the provisions of this charter, upon all matters pertaining to municipal affairs, as follows:

Seventeenth—To establish, build and repair bridges, to establish, lay out, alter, keep open, open, close, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city, and to drain, sprinkle, oil and light the same; to remove all obstructions therein; to establish the grades thereof; to grade, pave, macadamize, gravel and curb the same in whole or in part; and to construct gutters, culverts, sidewalks and cross-walks therein, or upon any part thereof; to cause to be planted, set out and cultivated shade trees therein and generally to manage and control all such highways and places.

Section 147. Out of the street fund shall be paid all sums authorized to be paid for repairing and improving streets which shall have been accepted so as to become a charge upon said city; for cleaning streets, crossings and sewers; for street sprinkling, or oiling; for all street work in front of, or assessable upon property owned by said city, or any department thereof, or by the government of the United States; for all repairs upon the public streets deemed of urgent necessity, and for all other expenditures on the streets and highways deemed necessary by the mayor and common council and authorized by any provision of this charter.

Section 224. In all matters pertaining to municipal affairs, concerning which provision is not made in this charter, the general laws of the state, in force at the time, shall be in force in this city, so far as the same may be applicable to the class of cities to which this city may belong.

19. San Diego.

(Stats. 1889, p. 643.)

Article II, section 2. Subject to the provisions, limitations, and restrictions in this charter contained, the common council shall have power to pass ordinances:

44. To open, close, straighten, or widen any street, road, or highway; to open and lay out any new street or highway through public or private property, upon making compensation to all persons whose property may be taken therefor, or injuriously affected thereby, upon the conditions and in the manner by law and in this charter provided; and in like manner to establish and change the grade of any street, road, or highway. But no compensation shall be allowed for damage to gas or water pipes, railway tracks, telegraph or telephone posts or wires, or other property or thing laid above, along, in, or under any street, highway, park, place, or other public property.

Article V, chapter 2. (Amendment, Stats. 1901, p. 881.) The mode and manner for the improvement of streets, lanes, alleys, places or courts in this city, where an assessment is levied for the payment of any part or portion of the expense thereof shall be as prescribed by the general law of the state of California, relative to the improvement of streets, lanes, alleys, places or courts in municipalities, in force at the time proceedings are taken for the improvement of the same.

Article V, chapter 4. (Amendment, Stats. 1901, p. 881.) That the mode and manner of laying out, opening, extending, widening, straightening or closing, in whole or in part, any street, square, lane, alley, court or place within said city, where an assessment is levied upon property for the purpose of paying any part or portion of the expense thereof, shall be in accordance with the provisions of the general laws of the state of California, relative to laying out, opening, extending, widening, straightening, or closing, in whole or in part, any street, square, lane, alley, court, or place within municipalities, in force at the time proceedings therefor are taken.

20. San Francisco.

(Adopted 1899. Amended 1907, 1909, 1911.)

ARTICLE I.

Section 5. No recourse shall be had against the city and county, or any board [or] officer thereof, for damage or loss to person or property suffered or sustained by reason of the defective condition of any sidewalk, street,

avenue, lane, alley, court or place, none of which has been finally accepted by the supervisors of the city and county as by law, or as in this charter provided; nor shall there be any recourse against the city and county, or any board or officer thereof, for damage to person or property suffered or sustained by reason of accident on any such sidewalk, street, avenue, lane, alley, court or place; but in any such case the person or persons on whom the law may have imposed the obligation to repair such defect in any such sidewalk, street or public highway, shall be liable to the party injured for the damage suffered or sustained.

When any portion of the roadway of a public street in the city and county which has been accepted by the supervisors as provided by law, shall be in such defective condition as to endanger persons or property in the use thereof; or when any public sewer is defective or in want of repair, it shall be the duty of the board of public works to cause any such defect in such roadway or in such sewer to be remedied or repaired. And, if through the official negligence of the said board such defect remains unremedied or unprotected, and in consequence thereof damage or loss to person or property is sustained or suffered, the said board shall be liable to the party injured for the damage sustained; provided, that a notice in writing directing attention to the existence of such defect, and specifying the particular street and block thereof whereon or wherein such defect exists, shall have been served upon the said board at least five days before such damage shall have been sustained; and provided, further, that there are at such time funds available to the said board for repairing or remedying such defect.

ARTICLE VI.

CHAPTER I.

Section 14. All public work authorized by the supervisors to be done under the supervision of the board of public works shall, unless otherwise determined by the board of public works, be done under written contract, except in case of urgent necessity as hereinafter provided; and except as otherwise specifically provided in this chapter, the following proceedings shall be taken in all cases in the matter of the letting of contracts by said board. Before the award of any contract for doing any work authorized by this article, the board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvement, not exceeding an estimated cost of five hundred dollars, shall be deemed of urgent necessity by the board, such repairs or improvement may be made by the board under written contract or otherwise, without advertising for sealed proposals.

Section 15. Said advertisement and notice shall invite sealed proposals to be delivered at a certain day and hour at the office of the board for furnishing the materials for the proposed work, or for doing said work, or for both, as may be deemed best by the board, and shall contain a general description of the work to be done, the materials to be furnished, the time within which the work is to be commenced, and when to be completed, and the amount of bond to be given for the faithful performance of the contract, and shall refer to plans and specifications on file in the office of the board for full details and description of said work and materials.

Section 16. All proposals shall be made upon printed forms to be prepared by the board, and furnished gratuitously upon application, with a form for the affidavit hereinafter provided for printed thereon. Each bid

shall have thereon the affidavit of the bidder that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the city and county, or any person interested in said improvement, for himself or any other person. All bids shall be clearly and distinctly written, without any erasure or interlineation, and if any bid shall have an erasure or interlineation it shall not be received or considered by the board. Any contract made in violation of any of the foregoing provisions, and in the case of improvement of streets, any assessment for the work done under such contract, shall be absolutely void.

All proposals offered shall be accompanied by a check, certified by a responsible bank, payable to the order of the clerk of the supervisors, for an amount not less than ten per centum of the aggregate of the proposal, and no proposal shall be considered unless accompanied by such check.

No person, corporation or firm shall be allowed to make, file, or be interested in, more than one bid for the same work. If on the opening of said bids more than one bid appear in which the same person, corporation or firm is interested, all such bids shall be rejected.

Section 17. On the day and at the hour specified in said notice inviting sealed proposals the board shall assemble and remain in session for at least one hour, and all bids shall be delivered to the board while it is so in session, and within the hour named in the advertisement. No bid not so delivered to the board shall be considered. Each bid as it shall be received shall be numbered and marked "Filed" by the president and authenticated by his signature. At the expiration of the hour stated in the advertisement within which the bids will be received, the board shall, in open session, open, examine and publicly declare the same, and an abstract of each bid shall be recorded in the minutes of the board by the secretary. Before adjourning, the board shall compare the bids with the record made by the secretary, and shall thereupon, at said time, or at such other time, not exceeding twenty days thereafter, as the board may adjourn to, award the contract to the lowest bidder, except as otherwise herein provided. Notice of such award shall forthwith be posted for five days by the secretary of the board in some conspicuous place in the office of the board, and be published for the same period of time.

The board may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the city and county, and all bids other than the lowest regular bid; and on accepting said lowest bid, shall thereupon return to the proper parties the checks corresponding to the bids so rejected. If all the bids are rejected, the board shall return all the checks to the proper parties and again invite sealed proposals as in the first instance.

The check accompanying the accepted bid shall be held by the secretary of the board until the contract for doing said work, as hereinafter provided, has been entered into, whereupon said certified check shall be returned to said bidder.

If said bidder fails or refuses to enter into the contract to do said work, as hereinafter provided, then the certified check accompanying his bid, and the amount therein mentioned, shall be forfeited to the city and county, and shall be collected and paid into the general fund. Neither the board of public works nor the supervisors shall have power to relieve from or remit such forfeiture.

Section 18. If at any time it shall be found that the person to whom a contract has been awarded has, in presenting any bid or bids, colluded with any other party or parties, for the purpose of preventing any other bid being made, then the contract so awarded shall be null and void, and the board shall advertise for a new contract for said work.

Section 19. In the case of improvement of streets, the owners of the major part of the frontage of lots and lands upon the street whereon the work is to be done, or which are liable to be assessed for said work, or, in the case of an assessment district, the owners of a major part of the superficial area embraced in such district, or their agents, shall not be required to present sealed proposals, but may, upon making oath that they are such owners, or the agents of such owners, within ten days after the first posting of notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should such owners not enter into a written contract therefor within said ten days, or should they enter into such contract and fail to commence the work within the time stated therein, which time shall not be less than ten nor more than twenty days from the time of the execution of such contract, the board shall enter into a contract with the original bidder to whom the contract was awarded at the price specified in his bid. If the original bidder shall fail or refuse for fifteen days after the first posting of notice of the award to enter into the contract, the board shall again advertise for proposals as in the first instance.

Section 20. If the owners or contractor who may have entered into any contract do not complete the same within the time limited in the contract, or within such further time as is hereinafter provided, the board may relet the unfinished portion of said work in accordance with the provisions in this chapter prescribed for the letting of the whole.

Section 21. All contracts shall be drawn under the supervision of the city attorney, and shall contain detailed specifications of the work to be done, the manner in which it shall be executed, and the quality of the material to be used.

Every contract entered into by the board shall be signed by all the members thereof, and by the other contracting party. All contracts shall be signed in triplicate, one of which, with the specifications and drawings, if any, of the work to be done, and materials to be furnished, shall be filed with the clerk of the supervisors; one thereof, with said specifications and drawings, shall be kept in the office of the board, and the other, with said specifications and drawings, shall be delivered to the contractor.

At the same time with the execution of the contract, the contractor shall execute to the city and county and deliver to the secretary of the board a bond in the sum named in the notice for proposals, with two or more sufficient sureties to be approved by the board, or shall deposit with the secretary a certified check upon some solvent bank for said amount, for the faithful performance of the contract. No surety on any bond other than lawfully authorized surety companies shall be taken unless he shall be a payer of taxes on real property, not exempt from execution or subject to homestead claim, the assessed value of which, over and above all encumbrances, is equal in amount to his liabilities on all bonds on which he may be surety to the city and county, and each surety shall justify and make an affidavit (for which a form shall be printed upon said bond) signed by him, that he is assessed upon the last assessment book of the city and county in his own name, for real property, in an amount greater than his

liability on all bonds on which he is surety to the city and county, and that the taxes on such property so assessed are not delinquent.

The contract shall specify the time within which the work shall be commenced, and when to be completed, as was specified in the notice inviting proposals therefor. Upon the recommendation of the board, the supervisors may extend said time, but in no event shall the time for the performance of said contract be extended by the supervisors more than ninety days beyond the time originally fixed for its completion; but, on the unanimous recommendation of the board of public works, a further extension may be granted by vote of fourteen members of the board of supervisors.

In case of failure on the part of the contractor to complete his contract within the time fixed in the contract, or within such extension of said time as is herein provided, his contract shall be void, and the supervisors shall not thereafter pay or allow him any further compensation for any work done by him under said contract; and in the case of the improvement of streets, where the work is to be paid for by assessment levied upon real property, no assessment shall be made for the work done under said contract.

Any contract may provide for progressive payments if in the ordinance authorizing or ordering the work permission is given for such a contract. But no progressive payments can be provided for or made at any time which, with prior payments, if there have been such, shall exceed in amount at that time seventy-five per cent of the value of the labor done and materials furnished and used up to that time, and no contract shall provide for or authorize or permit the payment of more than seventy-five per cent of the contract price before the completion and acceptance by the proper officer or board of the work done under said contract.

Section 22. The work in this article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this article must contain a provision to that effect, and also, that in no case, except where it is otherwise provided in this charter, will the city and county, or any department or officer thereof, be liable for any portion of the expense, or in the case of improvement of streets, for any delinquency of persons or property assessed.

When said work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon the board shall deliver to the contractor a certificate to that effect.

ARTICLE VI.

CHAPTER II.

Section 1. All streets, lanes, alleys, places or courts, in the city and county now open or dedicated or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purposes of this chapter; and the supervisors are hereby empowered to fix the width and grade thereof, and to order to be done therein and thereon any and all street work and street improvement under the proceedings hereinafter described.

Section 2. Application for the doing of any such work or improvement must in the first instance, except where otherwise provided in this article, be made in writing to the board of public works by an owner or owners of property liable to be assessed for the same, or by their agents, or by the

board of health for sanitary reasons, or by the supervisors, expressed by resolution.

Such application need but in general describe or refer to the work or improvement applied for; and if the expense thereof or any portion of such expense is to be assessed upon private property, the board of public works shall investigate the same, and may modify, amend, alter, or increase the same, as it may deem proper; and if the board determine that the work or improvement so applied for, or, as so modified, amended, altered or increased, is expedient, it shall so report to the supervisors; the supervisors shall not order any such improvement until the same has been recommended by said board. When the construction of any sewer or drain shall involve a cost of more than five dollars per lineal foot for any block, it shall not be authorized except by an ordinance passed by the affirmative vote of not less than fourteen members of the board of supervisors. If an application is made for any work or improvement of which the expense is to be paid by the city and county, and the board of public works shall not approve of such application, it shall report to the supervisors its reasons for such disapproval, and the supervisors may then, after having obtained from the board of public works an estimate of the expense of said work or improvement, by ordinance passed by the affirmative vote of not less than fourteen members of the board of supervisors, order the doing of said work, or the making of said improvement.

The board of public works may also, except as herein prohibited, recommend any improvement, the expense of which is to be paid by the city and county, though no application may have been made therefor, and must make, with said recommendation to the supervisors, an estimate of the expense, and in such case the supervisors may order the same done.

No street work or street improvements of any kind shall be ordered to be done by the supervisors unless a written recommendation to do the same has been made to them by the board of public works, except in the case hereinbefore provided, and all such recommendations shall be made matters of records in the office of said board.

When the board shall recommend any work to be done on a street intersection or crossing, where the streets do not intersect each other at right angles, it shall in each such case determine what lots in the blocks adjacent to such intersection or crossing will be benefited by said work, and shall cause a map to be made on which shall be delineated the lots so to be benefited. Such map shall be transmitted to the supervisors with said recommendation. [Amendment approved, and in effect, February 5, 1903.]

Section 3. Before recommending to the supervisors the ordering of any work or improvement, the expense of which, or any part thereof, is to be assessed upon private property, the board of public works shall pass a resolution of its intention to recommend the same, specifying the work to be recommended, and shall fix a day when it shall take final action upon said resolution.

Upon the passage thereof the secretary of the board shall forthwith, without any further authority, cause a copy of said resolution to be posted conspicuously for five days in the office of said secretary, and to be published for a period of ten days (legal holidays excepted) and cause a copy to be deposited in the postoffice at the city and county, with postage prepaid, addressed to each person represented on the assessment-book of the city and county for the next preceding fiscal year as being owner of land liable to be assessed for said improvement, but if said lot stand on said book in the name of unknown owners, such notice need not be sent.

The board shall also cause to be conspicuously posted along the line of said contemplated improvement, at points not more than one hundred feet in distance apart, notices, not less than three in all, of the passage of said resolution. Each of said notices shall be headed "Notice of Street Work" in letters of not less than two inches in length, and shall in legible characters state the fact of the passage of said resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars.

Section 4. The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block, or more, and, in the case of a district, those owning more than one-half of the superficial area of the district, exclusive of street surface, may make written objections to the same within ten days after the expiration of the time of the publication of said resolution of intention, which objections shall be delivered to the secretary of the board of public works, who shall indorse thereon the date of their reception by him. Such objections shall delay for six months any further proceedings in relation to the doing of said work or making said improvement, under the said resolution of intention, unless the owners of the one-half or more of the frontage or of the district, as aforesaid, shall meanwhile petition for the same to be done, and thereupon the proceedings shall be continued under the said resolution of intention, if said board shall deem proper.

If, however, the owners of at least two-thirds of the property fronting on said proposed work or improvement, and, in case of a district, those owning at least two-thirds of the superficial area of the district, exclusive of street surface, shall make written objections to the said proposed work or improvement, after the expiration of the time hereinbefore fixed for making the objections in the first instance to the same (and which objections delayed for six months any further proceedings in relation to the doing of said work or making said improvement under said resolution of intention) and before the expiration of the said six months, no further proceedings shall be taken under the said resolution of intention. But if no such objections have been made, then the board of public works, after the expiration of said six months, shall, if it deem proper, continue the proceedings under the resolution of intention aforesaid, notwithstanding the objections first made, as hereinbefore provided, or any further objections to the doing of said work or making said improvement.

But when the work or improvement proposed to be done is the construction of sewers, manholes, culverts, drains, cesspools, catch-basins or storm-water inlets, or of sidewalks, or of curbs, or any work or improvement on a street crossing, or on a street intersection, and written objections thereto have been delivered to the secretary of the board of public works within the time hereinbefore provided, by the owners of a majority of the frontage or of the district aforesaid, and in case of work or improvement on a street crossing or a street intersection, by the owners of a majority of the street frontage liable to be assessed therefor, the board shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The secretary of the board shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice at the city and county, postage prepaid, and addressed to each objector or his agent when he appears for such objector. At the time specified the board shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive; and if said objections are overruled the proceedings shall be continued as though no objections had been made.

And when not more than two blocks on a street, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon such street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, proceedings for the doing of any work or improvement, upon said intervening ungraded or unimproved part of said street, or at the end of a street, shall not be stayed or prevented by any written or other objections, unless the board shall deem proper.

And if one-half or more in width or in length, or as to grading, one-half or more of the grading work, of any street lying and being between two successive main street crossings, or if a crossing has been already partially graded or improved, as aforesaid, the board may proceed as in this chapter provided, to have the remainder improved, graded, or otherwise, notwithstanding any objections of property owners.

In all cases of work or improvement in this section hereinbefore provided, where the board of public works is vested with power to continue proceedings in relation to any proposed work or improvement, notwithstanding any objections of property owners to the doing of the same, the board may determine that such work or improvement is expedient, or that the public interest or convenience requires the doing of the same, and it may institute proceedings therefor and the provisions of section 2 of this chapter, requiring a written application to the board in the first instance, to be made therefor, shall not be applicable thereto.

At any time before the making of the assessment as hereinafter provided, all owners of lots of land liable to assessment therein, who, after the first publication of the aforesaid resolution of intention, may feel aggrieved, or who may have objections to any proceedings in relation to the performance of the work described in said resolution, may file with the secretary a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object. Such petition of remonstrance shall be passed upon by the board, and its decision thereon shall be final and conclusive. [Amendment approved, and in effect, February 5, 1903.]

Section 5. When the contemplated work or improvement in the opinion of the board of public works is of more than local or ordinary public benefit, it may recommend to the supervisors that the expense of such work or improvement be made chargeable upon a district, and said board shall in its resolution of intention set out the district benefited by said work or improvement and to be assessed to pay the expense thereof. Objections to the extent and boundaries of the district of lands to be benefited by said work or improvement may be made by any interested party, in writing, within ten days after the expiration of the time of publication of the resolution of intention.

The secretary of the board shall lay said objections before it and the board shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The secretary shall thereupon notify the persons making such objections by depositing a notice thereof in the post-office at the city and county, postage prepaid, addressed to each objector. At the time specified the board shall hear the objections urged and pass upon the same, and if said objections are overruled, its decision shall be final and conclusive as to the extent and boundaries of the district.

If the objections are sustained, the board shall proceed to set out another district to the extent and boundaries of which objections may be made and a hearing had thereon as above provided; and so on in like manner until a

district has been set out to the extent and boundaries of which all objections shall be overruled by the board—its decision in that behalf to be final and conclusive; and thereupon the proceedings shall continue the same as if no objections had been made. In its report to the supervisors the board shall accompany its report with a diagram on which shall be delineated each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work or improvement proposed to be done within the limits of the district. Such diagram shall be certified to be correct by the secretary of the board.

Section 6. When the work under any contract shall have been completed, the contractor shall make and file in the office of the board of public works an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with anyone on his behalf, to accept a price from him less than the price named in said contract, or to make any rebate or deduction to him from such price. Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work other than the property owners who were parties to the agreement, and shall make void, as to such persons so defrauded, any assessment made for the work done under such contract; and where there is more than one contractor each contractor shall make such affidavit.

Section 7. When any work in or upon any public street shall have been completed according to contract, and the affidavit mentioned in the next preceding section shall have been made, the board shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of this article, according to the nature and character of the work. The assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, the amount of each assessment, the name of the owner of each lot (if known to the board, and if not known, the word "Unknown" shall be written opposite the number of the lot and the amount assessed thereon); the number of each lot assessed, and shall have attached thereto a diagram exhibiting the street or street crossing on which the work has been done, and showing the relative location of each distinct lot to the work done, numbered to correspond with the numbers in the assessment, and showing the number of front feet assessed for said work. A mistake in the name of the owner shall not invalidate any assessment.

When the expense of such work falls in part upon any person, company or corporation having railroad tracks upon the street where such work has been done, said assessment shall include an assessment against said person, company or corporation, for its legal proportion of said expense, and the same shall constitute a lien upon the roadbed, rolling stock, franchises and other property of such person, company or corporation, for a period of two years from the date of recording the warrant, assessment and diagram hereinafter provided for.

Section 8. The expense of all work or improvement done upon any part of said streets, lanes, alleys, places or courts, under the order of the supervisors, shall be borne and paid for as follows:

First—The city and county shall pay out of the general fund the expense:

a. Of all work done on streets, crossings, and intersections of streets that have been or may be accepted by the city and county, after the acceptance

of the same, and all repairs and improvements deemed of urgent necessity that may be made upon the public streets and highways.

b. Of all work done in front of, or that may be assessed to, property owned by the city and county or by any department thereof.

c. Of all work done in front of, or that may be assessed to, property owned by the United States.

Second—The expense of all sewers, cesspools, manholes, culverts, and drains, and of all grading, planking, macadamizing, paving, piling and capping any street, or portion thereof, and of all curbs thereon, and of all work done on sidewalks, shall be assessed upon the lands within the block or blocks adjacent thereto as herein provided, except where by an assessment district it may be provided otherwise.

Third—The expense of all work on such portion of any street required by law to be kept in order by any person, company, or corporation having railroad tracks thereon, shall be borne and paid for by such person, company or corporation, and shall be included in the assessment hereinbefore provided for.

No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment-book of the city and county, provided, however, that such limitation shall not be applicable to any assessment or assessments that may be levied upon any property for the construction of sewers and appurtenances thereto.

Section 9. Subdivision One—Except where the expense incurred for the street work and improvement authorized herein is to be assessed upon a district as hereinafter provided, such expense, other than that to be paid by a person, company or corporation having tracks on the street where such work and improvement has been done, shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work.

Subdivision Two—The expense of all improvement except such as is done by contractors under the provisions of section sixteen of this chapter, until the streets, avenues, street crossings, lanes, alleys, places, or courts are finally accepted, as provided in section twenty-three of this chapter, shall be assessed upon the lots and lands as provided in this section according to the nature and character of the work.

Subdivision Three—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot on the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

Subdivision Four—Where a main street terminates in another main street, the expense of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main street, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Subdivision Five—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots half-way on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street if it does not meet another.

Subdivision Six—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place, or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another.

Subdivision Seven—Where a subdivision street, avenue, lane, alley, place, or court, terminates in another street, avenue, lane, alley, place, or court, the expense of the work done on one-half the width of the subdivision street, avenue, alley, place, or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street or avenue, lane, alley, place, or court so terminating, according to its frontage thereon, halfway on each side, respectively, to the next street, avenue, lane, alley, court, or place, or at the end of such street, avenue, lane, alley, place, or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

Subdivision Eight—Where any work mentioned in this chapter, manholes, cesspools, culverts, cross-walks, piling and capping excepted, is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered. When sewering or resewering is ordered to be done under the sidewalk or only on one side of a street for any length thereof, the assessment for its expense shall be made only upon the lots and lands fronting nearest upon that side, and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

Subdivision Nine—Any owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the supervisors, may perform at his or their own expense (after obtaining permission from the board of public works so to do, but before said board has passed its resolution of intention to recommend grading inclusive of this) any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon may procure, at his or their own expense, a certificate from the city engineer setting forth the number of cubic yards of cutting and filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter may file said certificate in the office of the board. Said certificate shall be recorded in a properly indexed book kept for that purpose in the office of the board. Whenever thereafter the supervisors order the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contract must express the price by the cubic yard for cutting and filling in grading, and such owner or owners, and his or their successors in interest, shall be entitled to credit on the assessment upon his or their lots and lands fronting on said street for grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been legally changed, only

for so much of said certified work as would be required for grading to the grade as changed. Such owner or owners shall not be entitled to any credit that may be in excess of the assessments for grading upon the lots and land owned by him or them, and proportionately assessed for the whole of said grading. The board shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the changed grade so much of said certified work as would be required for grading thereto, and shall enter corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands owned respectively by said certified owners and their successors in interest; but he shall not include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners or their successors in interest. When any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, except grading, on such street, in front of any block, at his or their own expense, and the supervisors shall subsequently order any work to be done of the same class in front of the same block, the work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, as provided in subdivision ten of this section; but the work so done at the expense of such owner or owners shall be upon the official grade, and in condition satisfactory to the board of public works at the time said order is passed.

Subdivision Ten—The board of public works may include in the resolution of intention any of the different kinds of work mentioned in this chapter, and it may except therefrom any of said work already done upon the street to the official grade. The lots and portions of lots fronting upon said accepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; but this shall not be construed so as to affect the special provisions as to grading contained in subdivision nine of this section.

Subdivision Eleven—When the resolution of intention declares that the expense of the work and improvement is to be assessed upon a district, immediately after the contractor has fulfilled his contract to the satisfaction of the board of public works, or to the satisfaction of the supervisors on appeal, the board of public works shall proceed to estimate upon the lands, lots, or portions of lots within said assessment district, as shown by the diagram provided for in section five of this chapter, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the expense of such proposed work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said district benefited thereby, to wit: Upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in this chapter.

Section 10. If at any time there shall be any street work or improvement done, and none of the methods hereinbefore provided are legally sufficient to authorize the board of public works to make an assessment to pay for the expense thereof, then said board shall, before it passes a resolution of its

intention to recommend the ordering of said work or improvement, establish by resolution a method by means of which such assessment shall be made; and on the completion of the work or improvement to the satisfaction of said board, or to the satisfaction of the supervisors on appeal, said board shall make an assessment to pay the expense thereof according to the method established by said resolution.

Section 11. In making all assessments the board of public works shall act as a board, and the assessment shall be authenticated by signatures of all the members thereof.

Section 12. To said assessment shall be attached a warrant which shall be signed by the president of the board of public works and countersigned by the secretary thereof. Said warrant shall be substantially in the following form:

By virtue hereof the board of public works of the city and county of San Francisco, by the authority vested in it, does authorize and empower [name of contractor] his [or their] agents, or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his [or their] warrant for the same.

[Date] ——. [Name of president of board of public works.]

Countersigned by [name of secretary of board of public works].

Said warrant, assessment and diagram shall be recorded in the office of the board. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment and diagram, all persons interested in said assessment shall be deemed to have notice of the contents of the record thereof.

After said warrant, assessment and diagram are recorded, the same shall be delivered to the contractor, or his agent or assigns, on demand, but not until after the payment to the board of the incidental expenses not previously paid by the contractor or his assigns. By virtue of said warrant said contractor, or his agents or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments.

When it shall appear by the final judgment of any court in this state having jurisdiction to render such judgment, that any suit brought to foreclose the lien of any assessment for street work made under this chapter, or in the recording thereof, has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality, thereof or therein, or in the return on the warrant issued pursuant to any such assessment, or in the recording of any such warrant, any person interested therein may, at any time within seven months after the entry of said final judgment, apply to the board for another assessment to be issued in conformity to law; and the board shall, within sixty days after the time of said application, make and deliver to said applicant a new assessment, diagram and warrant in accordance with law, and sign, record and authenticate the same as above provided. Such assessment shall be a lien upon the lots of land set out therein for the period of two years from the date of its recording, and suit may be brought to enforce said lien as provided in this chapter. Should such final judgment be that of the superior court for the city and county and an appeal therefrom to the supreme court of the state has been taken, no such other assessment shall be made until said appeal has been determined.

Section 13. The contractor or his assigns, or some person on his [or] their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made, the contractor, his assigns, or some person on his [or] their behalf, shall receipt the same upon the assessment in the presence of the person making such payment, and shall also give a receipt if demanded. When the persons so assessed, or their agents, cannot conveniently be found or when the owner of the lot is stated as "unknown" upon the assessment, then said contractor or his assigns, or some person on his or their behalf, shall publicly demand payment on the premises assessed.

The warrant shall be returned to the board of public works within thirty days after its date with a return indorsed thereon, signed by the contractor or his assigns, or some person on his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid in whole or in part, and the amount thereof. Thereupon the secretary of the board shall record the return so made in the margin of the record of the warrant and assessment.

The board can at any time receive the amount due upon any assessment and warrant issued by it and give a good and sufficient discharge therefor; but no such payment so made after suit has been commenced shall operate, without the consent of the plaintiff in the action, as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff.

The board may release any assessment upon the books of its office on the payment to it of the amount of the assessment with interest against any lot or on the production to it of the receipt of the party or his assigns to whom the assessment and warrant were issued. If any contractor shall fail to return his warrant within the time and in the form provided in this section he shall thenceforth have no lien upon the property assessed; but if any warrant is lost, upon proof of such loss a duplicate may be issued, upon which a return may be made with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of seven per centum per annum until paid.

Section 14. The owners, whether named in the assessment or not, the contractor or his assigns, and all other persons directly interested in any work provided for in this chapter, or in the assessment, feeling aggrieved by any act or determination of the board of public works in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the board, shall, within thirty days after the date of the warrant, appeal to the supervisors, by briefly stating their objections in writing and filing the same with the clerk of the supervisors. Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days. Upon such appeal the supervisors may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the board relative to said work, may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just; and require the work to be completed according to the directions of the supervisors, and may at their option direct the board of public works to correct the warrant, assessment or diagram in

any particular, or to make and issue a new warrant, assessment and diagram to conform to the decisions of the supervisors in relation thereto.

All the decisions and determinations of the supervisors, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities, which the supervisors might have remedied and avoided; and no assessment shall be held invalid, except upon appeal to the supervisors, as provided in this section, for any error, informality or other defect in the proceedings prior to the assessment, or in the assessment itself, where the board of public works has acquired jurisdiction to make the same.

Section 15. At any time after the period of thirty-five days from the day of the date of the warrant, or if an appeal has been taken to the supervisors, then, at any time after five days from the decision of the supervisors on such appeal, or after the return on the warrant, after the same may have been corrected, altered or modified, as herein provided, but not less than within thirty-five days from the date of the warrant, the contractor or his assignee may sue in his own name the owner or the mortgagee of the land, lots, or portions of lots assessed on the day of the date of the recording of the warrant, assessment and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of seven per centum per annum until paid.

In all cases of recovery under the provisions of this chapter the plaintiff shall recover the sum of fifteen dollars in addition to the taxable costs, as attorney's fees, but not any percentage upon said recovery. When suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees in addition to all taxable costs, notwithstanding that the suit may be settled or a tender be made before a recovery in said action, and he may have judgment therefor.

Said warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the board of public works and of the supervisors upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the lots of land assessed, and to order such premises to be sold on execution as in other cases of the sale of real estate by the process of said courts. In all actions brought to enforce the lien of assessments made pursuant to the provisions of this chapter the proceedings therein shall be governed and regulated by the provisions of this chapter, and, when not in conflict herewith, by the codes of this state.

Section 16. When, in the judgment of the board of public works, any portion of the roadway of any improved street, avenue, lane, alley, court or place, or any portion of any sidewalk thereof, in the city and county, none of which has been accepted by the supervisors as by law or as in this charter provided, shall be so out of repair or in such condition as to endanger persons or property passing thereon, or so as to interfere with the public convenience in the use thereof, the board is authorized to notify the owner or owners of any lot fronting on said portion of said street, avenue, lane, alley, court or place, or fronting on such portion of said sidewalk so out of repair or in such condition as aforesaid, by a notice in writing to be

delivered to him, or his agent, or to any of the persons referred to in section 19 of this chapter (and for the purpose of this section any of such persons shall be deemed the "owner"), requiring such owner to repair, or reconstruct, or improve forthwith, in such manner and with such material as the board may determine and direct, said portion of said street, avenue, lane, alley, court or place, to the center line thereof, or said portion of said sidewalk in front of the lot of which he is the owner.

If said repair, reconstruction or improvement be not begun within five (5) days after notice given as aforesaid, and diligently and without interruption prosecuted to completion, the board may, if it so determine, enter into a contract with any suitable person at the expense of such owner for the doing of the work of the required repair, or reconstruction, or improvement, after the following proceedings as in this section hereinafter provided shall have been taken by the board.

The board shall cause a notice inviting sealed bids for the doing of said required work to be conspicuously posted in its office for three days (legal holidays excepted), together with the specifications for such required work. The said notice shall specify the day and hour when such sealed bids must be delivered to the board and shall contain a general description of the work to be done, the time within which the work is to be commenced and when to be completed, and the amount of the certified check hereinafter provided for as a guaranty for the faithful performance of the contract, and shall refer to the specifications posted therewith. On the day and at the hour specified in said notice, the board shall assemble and remain in session for at least one hour, and all such bids shall be delivered to the board while it is so in session and within the hour named in the said notice. At the expiration of the hour stated in the said notice within which the bids will be received, the board shall, in open session, open, examine and publicly declare the same, and an abstract of each bid shall be recorded in the minutes of the board by the secretary. The board shall award the contract to the lowest responsible bidder, if in its judgment the bid of such bidder is reasonable and just.

The board may for good cause reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract awarded to him by the board.

No bid shall be considered by the board unless it be accompanied by a check, certified by a responsible bank, payable to the order of the clerk of the supervisors of the city and county, for an amount determined by the board, and specified in the said notice inviting bids. Such check shall be held by the board as a guaranty that the bidder to whom the contract has been awarded, as hereinbefore provided, will enter into contract to do said work and faithfully perform such contract.

If said bidder fails or refuses to enter into the contract to do said work as hereinafter provided, or if after having entered into the said contract said bidder fails to faithfully perform the contract, then the said certified check accompanying his bid shall be forfeited to the city and county, and shall be collected and paid into the general fund thereof.

The bidder to whom the contract for the said work has been awarded shall enter into a written contract therefor with the board of public works within five (5) days after the date of the award thereof. Upon the completion of the required repair, reconstruction or improvement by the contractor as aforesaid to the satisfaction of the board, it shall make and deliver to the contractor a certificate to the effect that such repair, reconstruction or improvement has been properly made by said contractor, and that

the charges for the same are reasonable and just, and that the board of public works has accepted the same. Upon the issuance of the said certificate the board shall surrender to the contractor the certified check hereinbefore provided for.

Until the sidewalk or the roadway of any improved street, avenue, lane, alley, court or place in the city and county is finally accepted as by law or as in this charter provided, the obligation as to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon.

Section 17. If the expense of the work and material for the repairs provided for in the last preceding section be not paid on demand to the contractor so employed, or his agent or assignee, said contractor, or his assignee, shall have the right to sue such owner, tenant, or occupant for the amount contracted to be paid; and the certificate provided for in said section shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the board of public works in a book kept by it in the office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien as in case of other assessments provided for in this chapter.

Section 18. In addition to the remedies above given the supervisors may prescribe the penalties that shall be incurred by any owner or person neglecting or refusing to make repairs when required, as hereinbefore provided. Such penalties shall be enforced for the use of the city and county by prosecution in the name of the people of the state of California in the court having jurisdiction thereof, and may be applied in the case of fines, to the payment of expense of any such repairs not otherwise provided for.

Section 19. The person owning the fee, or the mortgagee of such fee, or the person who, on the day the action is commenced, appears by deed duly recorded in the county recorder's office of the city and county, to have the legal title to the land, or the person in possession of lands, lots, portion of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as executor, administrator or guardian of the owner, shall be regarded, treated and deemed to be the "owner" for all the purposes of this chapter. And in case of property leased, the possession of the tenant or lessee holding and occupying under such persons shall be deemed to be the possession of such owner.

Section 20. Any tenant or lessee of any lot of land on which has been imposed an assessment under the provisions of this chapter may pay said assessment, or he may discharge any liability imposed thereon by virtue of the provisions of this chapter, or he may redeem the property within the time prescribed by law, if legally sold on execution, and may deduct the amount so paid from the rents due and to become due from him; and he shall have a lien upon, and may retain possession of, said lots until the amount so paid and advanced, with legal interest thereon, be satisfied from accruing rents or by payment by the owner.

Section 21. The records kept by the board of public works shall have the same force and effect as other public records, and duly certified copies therefrom may be used in evidence with the same effect as the originals. Said records shall, during all office hours, be open, free of charge, to the inspection of any citizen wishing to examine them.

Section 22. Notices in writing required to be given by the board may be served by any person over the age of twenty-one years, and the fact of

such service may be verified by the oath of the person making it. Such oath may be taken before the secretary of said board or before any member thereof.

Section 23. When any street or portion of a street has been or shall hereafter be fully constructed to the satisfaction of the board of public works and of the supervisors, and is in good condition throughout, and a sewer, gas-pipes, and water-pipes are properly laid therein, the same shall be accepted by the supervisors by ordinance; and thereafter such street or portion of a street shall be kept in repair and improved by the city and county. The supervisors shall not accept any portion of a street less than the entire width of a roadway including the curbing, and one block in length, or one entire crossing; but they may partly or conditionally accept any street, without a sewer or gas-pipes or water-pipes therein, if the ordinance of acceptance expressly states that they deem such sewer, or gas-pipes or water-pipes to be then unnecessary. In such case the lots of land previously or at any time assessable for the cost of constructing a sewer shall remain and be assessable for such cost and for the cost of repairs and restoration of the street damaged in said construction, whenever the supervisors shall deem a sewer to be necessary and shall order it to be constructed. The board of public works shall keep in its office a register of all streets accepted by the supervisors under this section, which register shall be indexed for easy reference thereto.

Section 24. The board of public works may at any time, without any application therefor, recommend to the supervisors to order the paving or macadamizing of the portion of any street required by law to be paved or macadamized by the person, company or corporation having railroad tracks thereon. Upon such recommendation the supervisors shall by ordinance order said work to be done and direct said board to notify said persons, company, or corporation of the fact of the passage of such ordinance.

The secretary of said board shall thereupon forthwith in writing notify said person, company or corporation of the passage of said ordinance; and if said person, company or corporation shall not within ten days after receiving said notice commence in good faith to do said work and prosecute the same diligently to completion, the board shall invite sealed proposals for doing said work in the manner provided in this article; and all the provisions of this article in regard to such proposals, to the awarding of contracts, to the execution of contracts, and to the doing of public work, shall apply to all similar proceedings taken under this section. On the completion of the work to the satisfaction of the board the contractor shall be entitled to recover from such person, company or corporation the contract price for the expense of said work, together with incidental expenses, in an action instituted in a court of competent jurisdiction. On the trial of such action, the certificate of the board of the completion of said work to its satisfaction shall be prima facie evidence of the regularity of all the proceedings prior thereto and of plaintiff's right to recover in said action.

Section 25. Except as otherwise in this chapter specifically provided, no ordinance for the improvement of any street other than for sewers, sidewalks and curbs, except for the improvement of the streets constituting or lying along the water front of the city and county, and except for such work as is provided for in the next preceding section, shall be passed by the supervisors without extending said improvement throughout the whole width of such street.

Section 26. Wherever in this article the word "street" occurs, it shall be held to include all streets, lanes, alleys, places and courts which have been, or may be hereafter, dedicated and open to public use, and whose grade and width have been legally established; and the grade of all intermediate or intersecting streets in any one block shall be deemed to conform to the grades as established at the crossings of the main streets.

The word "improvement" shall be held to include grading, paving, planking, macadamizing, piling and capping; and the construction and repairs of sewers, cesspools, manholes, culverts, drains, sidewalks and curbs.

The term "main street" shall mean such street or streets as bound a block, and the term "street" shall include crossing.

The work "block" shall mean the blocks known or designated as such upon the maps and books of the assessor.

The term "quarter block," as used in this chapter as to irregular blocks, shall be deemed to include all lots or portions of lots, having any frontage on either intersecting street halfway from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city and county.

The word "paved" shall include any pavement of stone, iron, wood, or other material which the supervisors may by ordinance order to be used; but no patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city and county all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon its streets under any contract that may be awarded to him, or entered into by him with the city and county.

The term "expense" shall include the price at which the contract was awarded, and the term "incidental expenses" shall include all expenses incurred in printing and advertising the work contracted for, and all expenses for surveying, measuring and inspecting the work.

All notices and resolutions required by this article to be published shall be published daily, legal holidays excepted, in the official newspaper.

All notices herein required to be served, whether by delivery, mailing or posting, may be so served by any male citizen of the age of twenty-one years, and his affidavit thereof shall be prima facie evidence of such service. The affidavit by the publisher of the official newspaper, or his clerk, of the publication of any notice required in this article to be published, shall be prima facie evidence of such publication.

Section 27. Whenever it shall appear to the owners of a majority of the frontage of the property on any public street for the entire length of said street, or for the length of one or more blocks thereof, that said alignment of such street or portion thereof can be materially improved by changing the same; or that the closing of such street or said portion thereof shall by such owners be deemed advisable, and that the opening for use as a public street of land granted for such purpose, in substitution for such street or said portion thereof, be proposed by such owners, they may petition the board of public works to recommend to the supervisors such proposed change in alignment, or such proposed closing and substitution.

If in the judgment of the board of public works the proposed change in alignment, or the proposed closing and substitution, be deemed of public benefit, it may pass a resolution recommending to the supervisors such change or alignment, or such closing and substitution. Before passing such resolution, the said board shall cause a notice of such petition to be published in the official newspaper for a period of five days, exclusive of legal

holidays, and which notice shall state the time and place at which the said board will consider such petition and hear objections thereto. Upon such recommendation as aforesaid, the supervisors may pass an ordinance in conformity therewith. In case the said board so recommends the closing of a public street or said portion thereof, and the substitution therefor proposed, and the supervisors by ordinance adopt such recommendation, the area of the said street or said portion thereof so closed shall revert to the owners of the property fronting thereon along the lines of their several property divisions, projected to the center line of the street or said portion thereof so closed. All grants of land or rights of way for a substituted public street, or for the change in the alignment of a public street, shall be without cost to the city and county, except as hereinafter provided, and all benefits and damages in connection with such substituted street, or such change of alignment, shall be adjusted by and between the owners of the properties affected by such grants therefor, in such manner as may be deemed equitable and just to them.

The supervisors may upon the recommendation of the board of public works make available such public funds as they may deem proper wherewith to advance the interests of the general public in the changes of alignment of public streets herein provided for. The right of eminent domain as now prescribed, or as may be hereafter prescribed by the laws of the state of California, may be exercised by the city and county, or by the property owners aforementioned, in the acquisition of the necessary properties for the change of alignment of existing streets, or the opening of a new street as herein provided for.

Section 30. Upon the recommendation of the board of public works, the board of supervisors, by an affirmative vote of not less than fourteen members thereof, may authorize the improvement, at the expense of the city and county, of any public street in the city and county not finally accepted as provided in section 23 of this chapter, in case such improvement shall be deemed by the supervisors to be of urgent public necessity and of more than local or ordinary public benefit; and the provisions of section 5 of this chapter shall not be applicable to such improvement.

The said improvement may be made by contract, as provided in section 14 of chapter I of this article, or by and under the direction of the board of public works, as the supervisors may determine.

Section 33. The method of procedure in this article provided for the improvement of streets, or for the construction of tunnels, subways, or viaducts and appurtenances thereto, and for the assessment of the expense thereof or any portion of such expense upon private property shall not be deemed exclusive, but the board of supervisors, by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the said board may by a like affirmative vote of the members thereof adopt an ordinance which may from time to time be revised and amended, providing a method of procedure for such improvement and assessment; and in such ordinance if said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments not to exceed ten years upon conditions as to said board may seem reasonable and just,

the rate of interest to be paid on such payments not to exceed seven per cent per annum.

ARTICLE VI.

CHAPTER III.

Section 1. Whenever the public interest or convenience may require, the supervisors shall have full power and authority to order the opening, extending, widening, straightening or closing up, in whole or in part, of any street, avenue, lane, alley, court, or place within the city and county and to condemn and acquire any and all land and property necessary and convenient for that purpose.

Section 2. Before ordering any work to be done or improvement made, which is authorized by the preceding section, the supervisors shall pass a resolution declaring their intention so to do, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof.

The supervisors may, in and by said resolution, declare and determine that the whole cost and expense of such work or improvement, or any proportion thereof, shall be paid out of the revenues of the city and county.

Section 3. The clerk of the supervisors shall transmit to the board of public works a certified copy of such resolution, and upon receipt thereof said board of public works shall cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. Said notice shall be headed "Notice of Public Work" in letters not less than one inch in length, shall be in legible characters, state the fact of the passage of the resolution, its date, and briefly the work of improvement proposed, and refer to the resolution for further particulars. Said board shall also cause a notice, similar in substance, to be published for a period of ten days in the official newspaper.

Section 4. Any person interested objecting to said work or improvement, or to the extent of the district or lands to be affected or benefited by said work or improvement, and to be assessed to pay the cost and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice, which objection shall be delivered to the clerk of the supervisors, who shall indorse thereon the date of its reception by him, and at the next meeting of the supervisors after the expiration of said ten days lay said objection before the supervisors, who shall fix a time for hearing said objections, not less than one week thereafter. The clerk of the supervisors shall notify the persons making such objections by depositing a notice thereof in the postoffice, postage prepaid, addressed to such objector.

Section 5. At the time specified, or to which the hearing may be adjourned, the supervisors shall hear the objections urged, and pass upon the same, and their decision shall be final and conclusive. If such objections are sustained all proceedings shall be stopped, but proceedings may again be commenced at any time by giving notice of intention to do said work or make said improvement. If such objection is overruled by the supervisors, the proceedings shall continue the same as if such objection had not been made. At the expiration of the time prescribed, during which objections to said work or improvement may be made, if no objections shall have

been made, or if objections shall have been made, and the supervisors, after hearing, shall have overruled the same, the supervisors shall be deemed to have acquired jurisdiction to order any of the work to be done or improvement to be made which are authorized by section 1 of this chapter, and by resolution shall order said work to be done or improvement to be made, as the case may be.

Section 6. Upon the passage of said resolution the clerk of the supervisors shall transmit a certified copy thereof to the board of public works. Upon receipt of the same said board of public works shall proceed to view the lands described in the resolution of intention, and may examine witnesses on oath to be administered by any member of said board in relation thereto. Having viewed the lands to be taken, and the improvements affected, and considered the testimony presented, they shall proceed with all diligence to determine the value of the land and the damage to improvements and property affected, and also the amount of the expenses incident to said work or improvement, and, having determined the same, shall proceed to assess the same upon the district of lands declared benefited, the exterior boundaries of which were fixed by the resolution of intention provided for by section 2 hereof. Such assessment shall be made upon the lands within said district in proportion to the benefit to be derived from said work or improvement, so far as said board can reasonably estimate the same, including in such estimate the property of any railroad company within said district, if such there be. In case, however, the supervisors shall have declared that the whole of such expense shall be paid out of the revenues of the city and county, then no such assessment shall be made, but the board of public works shall, in such event, report to the supervisors in detail an estimate of the value of the land to be taken, the damages to improvements and the amount of expenses incident to said work, and if the supervisors shall approve such estimate they shall order the amount so fixed to be paid to the persons respectively entitled thereto, as in section 15 hereof provided.

Section 7. Said board of public works having made their assessment of benefits and damages, shall, with all diligence, make a written report thereof to the supervisors, and shall accompany their report with a plat of the assessment district showing the land taken or to be taken for the work or improvement, and the lands assessed, showing the relative location of each district, block, lot or portion of lot, and its dimensions, so far as can be reasonably ascertained. Each block or lot, or portion of lot, taken or assessed, shall be designated and described in said plat by an appropriate number, and a reference to it by such descriptive number shall be a sufficient description of it in any suit entered to condemn, and in all respects. When the report and plat are approved by the supervisors, a copy of said plat, appropriately designated, shall be filed by the clerk thereof in the office of the recorder of the city and county.

Section 8. Said report shall specify each lot, subdivision or piece of property taken or injured in the widening or other improvement, or assessed therefor, together with the name of the owner or claimants thereof, or of persons interested therein as lessees, encumbrancers, or otherwise, so far as the same are known to said board of public works, and the particulars of their interest so far as the same can be ascertained, and the amount of value or damage, or the amount assessed, as the case may be.

Section 9. If in any case the board of public works find that conflicting claims of title exist, or if they shall be in ignorance or doubt as to the

ownership of any lot of land, or of any improvements thereon, or of any interest therein, it shall be set down as belonging to unknown owners. Error in the designation of the owner or owners of any lot of land or improvements, or of the particulars of their interest, shall not affect the validity of the assessment or of the condemnation of the property to be taken.

Section 10. Said report and plat shall be filed in the clerk's office of the supervisors, and thereupon the clerk of said board shall give notice of such filing by publication for at least ten days in the official newspaper. Said notice shall also require all persons interested to show cause, if any, why such report should not be confirmed, before the supervisors on or before a day fixed by the clerk thereof, and stated in said notice, which day shall not be less than thirty days from the first publication thereof.

Section 11. All objections shall be in writing, and filed with the clerk of the supervisors, who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the supervisors, who shall fix a time for hearing the same, of which the clerk shall notify the objectors in the same manner as objectors to the original resolution of intention. At the time set, or at such other time as the hearing may be adjourned to, the supervisors shall hear such objections and pass upon the same; and at such time, or, if there be no objections, at the first meeting after the day set in said order to show cause, or such other time as may be fixed, shall proceed to pass upon such report, and may confirm, correct or modify the same, or may order the board of public works to make a new assessment, report and plat, which shall be filed, notice given, and hearing had, as in the case of an original report. If the supervisors shall have determined that a certain proportion of the cost and expense of such work and improvement shall be paid out of the revenues of the city and county, they shall deduct such proportion from the total amount of the cost and expense thereof as finally fixed and determined in and by said assessment and report, and the amount of such proportion shall be paid out of any revenues appropriated for such purpose to the persons respectively entitled thereto, at the same time and in the same manner as in section 15 hereof provided, and the balance shall be raised by assessment as hereinafter provided.

Section 12. The clerk of the supervisors shall forward to the board of public works a certified copy of the report, assessment and plat, as finally confirmed and adopted by the supervisors, with a statement of any deduction that may be made on account of payments made out of the revenues of the city and county, as in section 11 provided. Such certified copy shall thereupon be the assessment-roll. Immediately upon receipt thereof by the board of public works the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained or described therein.

Section 13. The board of public works shall thereupon give notice by publication in the official newspaper for ten days that it has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums is to be made to said board within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent, and that thereafter the sum of five per cent upon the amount of such delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto. When payment

of any assessment is made to said board of public works it shall cause to be written the word "Paid," and the date of payment, opposite the respective assessments so paid, and the names of persons by or for whom said assessment is paid, and shall, if so required, give a receipt therefor. On the expiration of said thirty days all assessments then unpaid shall be and become delinquent, and said board of public works shall certify such fact at the foot of said assessment-roll and shall add five per cent to the amount of each assessment so delinquent.

Section 14. The said board of public works shall, within five days after the date of said delinquency, proceed to advertise and collect the various sums delinquent, and the whole thereof, including the cost of advertising, which last shall not exceed the sum of fifty (50) cents for each lot, piece or parcel of land separately assessed, by the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes; and after the date of said delinquency, and before the time of such sale herein provided for, no assessment shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the costs of advertising then already incurred, shall be paid therewith. Said list of delinquent assessments shall be published for five days in the official newspaper before the day of sale of such delinquent assessment. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of said board of public works. All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the board of public works may collect for each certificate fifty cents and for each deed one dollar. All provisions of the law, in reference to the same and redemption of property, for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certain certificates and execution of deeds. The deed of the board of public works made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee. It shall be conclusive evidence of the necessity of taking or damaging the lands taken or damaged, and of the correctness of the compensation awarded therefor. The board of public works shall, from time to time, pay over to the city treasurer all moneys collected by it on account of any such assessments. The treasurer shall, upon receipt thereof, place the same in a separate fund, designating such fund by the name of the street, avenue, square, lane, alley, court or place for the widening, opening or other improvement of which the assessment was made. Payment shall be made from said fund to the parties entitled thereto, upon warrants signed by the members of the board of public works, or a majority of them.

Section 15. When sufficient money is in the hands of the treasurer, in the fund devoted to the particular work or improvement, to pay for the lands and improvements taken or damaged, and when in the discretion of the board of public works the time shall have come to make payments, it shall be the duty of said board to notify the owner, possessor or occupant of any land or improvements thereon to whom damages shall have been awarded, that a warrant has been drawn for the payment of the same, and that he can receive such warrant at the office of said board upon tendering a conveyance of any property to be taken; such notification, except in the case of unknown owners, to be made by depositing a notice, postage paid, in

the postoffice, addressed to his last known place of abode or residence. If at the expiration of thirty days after the deposit of such notice he should not have applied for such warrant, and tendered a conveyance of the land to be taken, the warrant so drawn shall be deposited with the treasurer and shall be delivered to such owner, possessor or occupant upon tendering a conveyance as aforesaid, unless judgment of condemnation shall be had, when the same shall be canceled.

Section 16. If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor as aforesaid, or objects to the report as to the necessity of taking his land, the board of public works shall report such facts to the supervisors, who shall thereupon cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity. Such proceedings shall be brought in the name of the city and county, and have precedence, so far as the business of the court will permit, and any judgment for damages therein rendered shall be payable out of such portion of the special fund as may remain in the treasury, so far as the same can be applied. At any time after trial and after judgment has been entered, or preceding an appeal, the court may order the treasurer to set apart in the treasury a sufficient sum from the fund appropriated to the particular improvement to answer the judgment and all damages, and thereupon may authorize and order the city and county to enter upon the land and proceed with the proposed work and improvement. In case of a deficiency in said fund to pay the whole of such judgment and damages, the supervisors may, in their discretion, order the balance thereof to be paid out of the general fund of the treasury or to be distributed by the board of public works over the property by a supplementary assessment; but in the last-named case, in order to avoid delay, the supervisors may advance such balance out of any appropriate fund in the treasury, and reimburse the same from the collections of the assessment. Pending the collection and payment of the amount of the judgment and damages, the court may order such stay of proceedings as may be necessary.

Section 17. The treasurer shall pay such warrants out of the appropriate fund, and not otherwise, in the order of their presentation, provided, that warrants for land or improvements taken or damaged shall have priority over warrants for charges and expenses, and the treasurer shall see that sufficient money is and remains in the fund to pay all warrants of the first class before paying any of the second.

Section 18. If after the sale of property for delinquent assessments there should be a deficiency, and there should be unreasonable delay in collecting the same, or if for the purpose of equalizing the assessments supplying a deficiency, or for any cause it appears desirable, the board of public works may so report to the supervisors, who may order them to make a supplementary assessment and report the same in manner and form as the original, and subject to the same procedure. If by reason of such supplementary assessment, or for any cause, there should be at any time a surplus, the supervisors may appropriate the same and declare a dividend pro rata to the parties paying the same, and they, upon demand, shall have the right to have the amount of such pro rata dividends refunded to

them, or credited upon any subsequent assessment for taxes made against said parties in favor of said city and county.

Section 19. If any title attempted to be acquired by virtue of this act shall be found to be defective from any cause the supervisors may again institute proceedings to acquire the same as in this chapter provided, or otherwise, or may authorize the board of public works to purchase the same and include the cost thereof in a supplementary assessment, as provided in the last section.

ARTICLE VI.

CHAPTER VI.

Section 1. The board of supervisors is hereby empowered, on the written recommendation of the board of public works, to change or modify the grade of any public street, avenue, lane, alley, place or court to the grade set out in such recommendation, and to regrade, repave, sewer, sidewalk, curb or otherwise improve the same, so as to conform to such change or modified grade in the manner as hereinafter provided. Before any change of grade is attempted, the board of supervisors shall pass a resolution of intention to make such change or modification of grade, and it shall in the same resolution, when regrading, repaving, sidewalking, sewering, curbing or other improvement on such street or streets is contemplated in connection therewith, define and establish the district benefited and to be assessed for the payment of damages and for the expense of regrading, repaving, sewering, sidewalking, curbing, or otherwise improving such street or streets so as to conform with such change or modified grade; and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets or portions thereof with the same or other material with which it was formerly graded, paved, sewered, sidewalked, curbed or otherwise improved, briefly describing the work to be done and providing that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such change or modified grade. When a change or modification of grade or grades is proposed to be made upon a street, avenue, alley, lane, court or place, which has already been sewered, paved, curbed or graded, no such change or modification of such grade or grades shall be made unless provision shall also be made for the resewering, repaving, recurbing or regrading of such street, avenue, alley, lane, court or place. One or more streets or blocks of streets may be embraced in the same resolution. Such resolution shall be published in the official newspaper. Such publication shall be made for ten days, and shall describe the proposed change or modification of grade, and when such resolution contemplates such work it shall describe the regrading, repaving, sewering, sidewalking, curbing or other improvement so contemplated, and shall set forth and describe the district to be benefited by such change or modification of grade or regrading, repaving, sewering, sidewalking, curbing or other improvement, and to be assessed for the damages and cost of making the same. Within ten days after the first publication of the resolution of intention the board of public works shall cause to be conspicuously posted along all streets within the district defined in the resolution, or, when no such district is defined, along the street or streets upon which such change or modification of grade or grades is contemplated, notice of the passage of said resolution. Said notices shall be posted not more than one hundred feet apart and shall be headed "Notice of Grade Change" or "Notice of Grade Change and Street Work," as the case may be, in letters not less than two inches in length, and shall,

in legible characters, state the fact of the passage of the resolution, its date, the fact of the proposed grade change, and, if any, briefly the work or improvement proposed, and refer to the resolution for further particulars. When no improvements are provided for in connection with the said change or changes of grade or grades, if no protest of the owners of two-thirds of the property fronting on the street or streets, the grade or grades of which is to be changed or modified, shall be filed with the clerk of the board of supervisors within forty days from the first publication of the resolution of intention hereinbefore mentioned, the board of supervisors shall have power to declare such grade or grades to be changed or modified and established, in conformity with said resolution; and when such improvement or improvements are contemplated in connection with such change, or changes of grade or grades, if no protest of the owners of a majority of the superficial area of the property included within the assessment district defined in said resolution of intention shall be filed with the clerk of the board of supervisors within forty days from the first publication of said resolution hereinbefore mentioned, the board of supervisors shall also have the power to order any of the work contemplated therein to be done, and such street or streets to be regraded, repaved, sewered, sidewalked, curbed or otherwise improved in conformity therewith.

Section 2. In case the resolution of intention provides for regrading, repaving, sewering, sidewalking, curbing or otherwise improving said street or streets, to said changed or modified grade, any person owning property fronting upon said portions of the street or streets where such street work is to be done, may file a petition with the board of public works within sixty days after the first publication of said resolution of intention, showing the fact of such ownership, a description and situation of the property claimed to be damaged, its market value, and the estimated amount of damages over and above all benefits which the property would sustain by the proposed change if completed. Such petition shall be verified by the oath of the petitioner or his agent. A failure so to petition shall be deemed and treated as a waiver of any claim for such damage or damages, and said resolution of intention shall so declare.

Section 3. Whenever such petition or petitions have been filed, the board of public works shall estimate and assess the benefits, damages and costs of the proposed work or improvement upon each separate lot of land situated within such assessment district as said lot appears of record upon the last city and county assessment-roll.

Section 4. The board of public works shall have power to subpoena witnesses to appear before them to be examined under oath, which any member of the board of public works is authorized to administer.

Section 5. The board of public works having determined the damages which would be sustained by each petitioner, in excess of all benefits, shall proceed to assess the total amount thereof, together with the costs, charges and expenses of the proceedings, upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such work or improvements.

Section 6. The board of public works shall make their report in writing, and shall subscribe to and file the same with the board of supervisors. In such report they shall describe separately each piece of property which will sustain damage and for which damages have not been waived, stating the name of the owner, if known, and the amount of damages each will sustain over and above all benefits. They shall also describe separately

each lot benefited within said assessment district, the name of the owner, if known, and the amount of benefits in excess of the damages assessed against the same. In describing the lots to be assessed, reference may be had to a diagram of the property in such assessment district, such diagram to be attached to and made a part of the report of the board of public works. If in any case the board of public works shall find that conflicting claims of title exist, or shall be in ignorance or doubt of the ownership of any lot of land, or any improvement thereon, or any interest therein, it shall be set down as belonging to unknown owners. Error in designation of the owner or owners of any land or improvement or particulars of their interest, shall not affect the validity of the assessment.

Section 7. On the filing of said report, the clerk of the board of supervisors shall give notice of such filing by the publication of a notice for at least ten days in the official newspaper. Said notice shall require all persons interested to show cause, if any they have, before the board of supervisors, on a day to be fixed by the said board and stated in said notice, which day shall not be less than twenty days from the first publication thereof, why such report should not be confirmed.

Section 8. All objections filed in response to said notice to show cause shall be in writing and filed with the clerk of the board of supervisors, who shall, at the next meeting after the date fixed in the notice to show cause, lay the said objections, if any, before the board of supervisors, which shall fix a time not less than fifteen days thereafter for hearing the same, of which time the clerk shall notify the objectors by notice published in the official newspaper for a period of five days and by depositing a notice, postage prepaid, in the United States postoffice at San Francisco, addressed to each objector at his last known place of residence, at least ten days before the date of such hearing. At the time set, or at such other time to which the hearing may be adjourned, the board of supervisors shall hear such objections and pass upon them, and at such time shall proceed to pass upon such report and may confirm, correct or modify the same, or may order the board of public works to make a new assessment, report and plat, which shall be filed, notice given and had, as in the case of the original report.

Section 9. After the report of the board of public works as to the damages caused by such change of grade has been finally passed upon by the board of supervisors, such board of public works shall prepare detailed plans and specifications subject to the approval of the board of supervisors, for regrading, paving, sewering, sidewalking, curbing or otherwise improving such street or streets as set forth in said resolution of intention and shall then advertise for bids to perform the work of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets, as the case may be, with the same or other material with which the same have been formerly graded, paved, sewered, sidewalked, curbed or otherwise improved; first causing a notice, with such specifications to be posted conspicuously for fifteen days in or near the office of the board of public works, inviting sealed proposals or bids for doing such work, and shall also cause notice of said work, inviting said proposals and referring to the specifications posted and already on file, to be published five days in the official newspaper. All proposals or bids offered shall be accompanied by a check payable to the order of the clerk of the board of supervisors, and certified by a responsible bank for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for said

amount, signed by the bidder and two sureties, who shall justify under oath in double said amount over and above all the statutory exemptions. Said proposals or bids shall be delivered to the secretary of the board of public works, and said board of public works shall, in open session, examine and declare the same; provided, however, that no proposal or bid shall be received unless accompanied by a check or a bond satisfactory to the board of public works. The board of public works may reject any or all bids and may award the contract to the lowest responsible bidder, or may re-advertise for proposals or bids for the performance of the work, as in the first instance, and thereafter proceed in the manner in this section provided; all checks accompanying bids shall be held by the secretary of the board of public works until the successful bidder has entered into a contract as herein provided, and in case he refuses so to do, then the amount of his certified check shall be declared forfeited to the city and shall be collected and paid into its general fund, and all bonds so forfeited shall be prosecuted and the amount thereof collected and paid into the said fund. Notice of the awards of the contracts shall be published and posted in the same manner as hereinbefore provided for the advertising for proposals for such work. Before being entitled to a contract, the successful bidder must advance to the secretary of the board of public works, for payment by him, the cost of publication of the notices, resolutions, orders, or the incidental expenses and matters required under the proceedings described by this chapter.

Section 10. After such contract has been awarded and entered into, the board of public works shall proceed to assess the cost and expense of doing such work upon all the lots and land lying within the district to be assessed, distributing the same so that each lot will be assessed for its proportion of the same according to the benefits it receives from the work. The board of public works in making such assessment shall also include therein the total amount for which each lot, or tract is assessed for the damages resulting from the regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets; provided, no assessment for such damages and cost and the expense of such work shall be levied upon any property which will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment-book of the city and county.

Section 11. The secretary of the board of public works shall forward to the board of supervisors a certified copy of the report and assessment as finally adopted by the board of public works, whereupon such report and assessment shall be changed, modified or confirmed by the board of supervisors, and upon such modification, change, or confirmation thereof, shall be returned to the board of public works and shall thereupon be the assessment-roll. Immediately upon receipt thereof by the board of public works, the assessment therein contained shall become due and payable and shall be a lien upon all the property contained or described therein.

Section 12. The board of public works shall thereupon give notice by publication for ten days in the official newspaper, that it has received said assessment-roll, and that all sums levied and assessed in said assessment-roll are due and payable immediately, and that the payment of said sums are to be made to the board of public works within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will be declared to be delinquent; that thereafter the sum of five per cent upon the amount of said delinquent assessment, together with

the cost of advertising each delinquent assessment, will be added thereto. When payment of any assessment is made to said board of public works, the secretary thereof shall write the word "Paid" and the date of payment opposite the respective assessments so paid, and the name of the person by or for whom said assessment is paid, and shall give a receipt therefor. On the expiration of said thirty days all assessments then unpaid shall be and become delinquent and the secretary of said board of public works shall certify such fact at the foot of said assessment-roll, and shall add five per cent to the amount of each assessment so delinquent. The said secretary of the board of public works shall, within five days from the date of such delinquency, proceed to advertise the various sums delinquent and the whole thereof, including the cost of advertising which shall not exceed the sum of fifty cents for each lot, piece or parcel of land separately assessed, in the same manner as is or may be provided for the publication of the delinquent list of state and county taxes; and after the date of said delinquency and before the time of such sale therein provided for, no assessments shall be received unless at the same time the five per cent added thereto, as aforesaid, together with the cost of advertising already incurred, shall be paid therewith. Said list of delinquent assessments, with a notice of the time and place of sale of property affected thereby, shall be published daily for five days in the official newspaper, before the sale of property for such delinquent assessments. Said time of sale must not be less than seven days from the date of the first publication of said delinquent assessment list, and the place must be in or in front of the office of the secretary of the board of public works. All property sold shall be subject to redemption for one year and in the same manner as in sales for delinquent state and county taxes; and the secretary of the board of public works shall, if there be no redemption, make and deliver to the purchaser at such sale a deed conveying the property sold and may collect for each certificate fifty cents, and for each deed one dollar. The deed of the secretary of the board of public works, made for such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings thereunder, and that all title is in the grantee. The secretary of the board of public works shall, from time to time, pay over to the city treasurer all moneys collected by him, or by the board of public works, on account of such assessments, which the city treasurer shall, upon receipt thereof, place in a separate fund, designating each fund by the name of the street, avenue, square, lane, alley, court or place for the change of grade for which the assessment was made. And the city treasurer shall transfer to said fund such sum or sums as the supervisors may have ordered to be paid or advanced for or on account of such improvement out of that fund in the treasury of the city and county from which such appropriation is made. Payment shall be made from said fund to the parties entitled thereto, upon warrants issued by the secretary of the board of public works on order of said board.

Section 13. When sufficient money is in the hands of the city treasurer to pay the total cost for damages, as well as the cost of doing the work, and all other expenses connected therewith, it shall be the duty of the board of public works to notify the owner, possessor or occupant of the premises damaged, and to whom damages have been awarded, that a warrant has been drawn for the payment of the same, which may be received at the office of said board of public works. Such notification may be made by depositing a notice, postage paid, in the United States postoffice, at San Francisco, addressed to his last known place of residence. If, after the

expiration of three days from the service or deposit of the notice in the postoffice, he shall not have applied for such warrant, the same shall be drawn and deposited with the city treasurer to be delivered to him upon demand.

Section 14. After the contractor to whom has been awarded the contract for regrading, repaving, sewering, sidewalking, curbing, or otherwise improving such street or streets, has fulfilled his contract to the satisfaction of the board of public works and the city engineer has certified to the completion of said work, the secretary of the board of public works, on order of said board, shall issue a warrant, payable out of said fund, in favor of such contractor in payment for such work.

Section 15. In case of a deficiency of the fund to pay the whole assessed cost and damages, the board of supervisors may in its discretion, order the balance thereof to be distributed by the board of public works upon the property assessed, by a supplementary assessment, or direct the payment of such balance to be made from the city treasury; but in the event that a supplementary assessment is ordered, in order to avoid delay, the board of supervisors may advance such balance out of any available fund in the treasury and reimburse the same from the collection of assessments. The treasurer shall pay such warrants in the order of their presentation.

Section 16. The board of supervisors may, in its discretion, order, by ordinance, that the whole or any part of the cost and expense of any of the work hereinbefore in this chapter mentioned or the damages resulting therefrom, be paid out of the treasury of the city and county from such fund as the board of supervisors may designate. Whenever a part of such cost or expense is so ordered to be paid before the making of an assessment therefor, the board of public works, in making up the assessment heretofore provided for such cost or expense, shall first deduct from the whole cost and expense such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expense proportionately upon the lots, parts of lots and lands in said assessment district, or liable to be assessed for such work, and in the manner hereinbefore provided.

ARTICLE VI.

CHAPTER VIII.

Section 1. The board of supervisors are hereby empowered to order the construction of any tunnel, subway or viaduct, in, on, under, or over, any accepted or unaccepted open public street, avenue, lane, alley, place or court, within the city and county, or any other lands of the city and county, or in, on, under, or over, any land in which and where the city and county may then have an easement or right of way therefor, and to levy the cost and expenses thereof upon private property, in the manner and under and subject to the proceedings, powers, restrictions and limitations in chapter II and chapter VII of this article, provided for street work and street improvement.

Section 2. The board of supervisors are hereby empowered to authorize the acquisition, by purchase or condemnation, and to acquire by purchase, or to condemn and acquire, any and all land, or any easement of right of way therein, thereon, thereunder or thereover, and any property necessary and convenient for any purpose mentioned in section 1 of this chapter, and to levy the damages, costs and expenses thereof upon private property, in the manner and under and subject to the proceedings, powers, restrictions

and limitations in chapter III and chapter VII of this article, provided for the opening, extending, straightening, or closing up, in whole or in part, of any street, avenue, lane, alley, court or place.

Section 3. The board of supervisors may, in its discretion order that not more than one-half of the whole of the costs and expenses of any of the work or acquisitions in sections 1 and 2 of this chapter mentioned, or the damages resulting therefrom, be paid out of the treasury of the city and county from such fund as the board of supervisors may designate. Whenever a part of such cost or expense is so ordered to be paid before the making of an assessment therefor, the board of public works, in making up the assessment provided for such cost and expense, shall first deduct from the whole cost and expense such part thereof as has been ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expense proportionately upon the lots, parts of lots, and lands in the assessment district or liable to be assessed therefor, and in the manner hereinbefore referred to and provided.

Section 4. No railroad other than a street railroad shall ever be operated through, in or along any tunnel, subway or viaduct constructed or acquired under the provisions of this charter, and no person, firm or corporation shall ever be granted the exclusive right to operate a street railroad through, in or along such tunnel, subway or viaduct. Two or more lines of street railways operated under different managements, or the city and county in the operation of a municipal railway may use the same tunnel, subway or viaduct for the entire length thereof and for five consecutive blocks approaching each end thereof, each management paying an equal portion of the expense for the construction, maintenance and repair of the tracks and appurtenances used by said railways jointly.

21. San Jose.

(Stats. 1897, p. 592.)

Article III, chapter 2, section 1. The mayor and common council shall have power:

Fourteenth—To construct and repair sewers, public buildings, and structures.

Fifteenth—To repair, clean, sprinkle, widen, straighten, and improve streets and sidewalks, and to open and close up streets.

Article V, chapter 3, section 7. Out of the street fund shall be paid all sums authorized to be paid for repairing and improving streets, which shall have been accepted so as to become a charge upon said city; for cleaning streets, crossings, and sewers; for street sprinkling; for all street work in front of or assessable upon property owned by said city or any department thereof, or by the government of the United States; for all repairs upon the public streets deemed of urgent necessity; for all work authorized by the mayor and common council which may be necessary for public health, or which cannot be assessed upon private property; and for all other expenditures on the streets and highways deemed necessary by the mayor and common council and authorized by any provision of this charter.

Article VIII, chapter 1, section 1: An act of the legislature of the state of California entitled "An Act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, as since amended, and as

hereafter shall be amended, is hereby adopted as a part of this charter, and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act conflict or are inconsistent with the provisions of this charter.

Section 2. When the estimated expense of any improvement being made under said act exceeds two dollars per front foot along each line of the street proposed to be improved, the superintendent of streets, at the time of posting along the street the notices of the passage of the resolution of intention, shall cause to be deposited on the front doorstep of each dwelling fronting on the proposed improvement a copy of Part I of said act.

Section 3. If the improvement is being made under the provisions of section 13 of said act, with the notice requiring the repair or construction to be made, the superintendent of streets shall, in like manner, deposit a copy of sections 13, 14, 15, 16, and 17 of said act, and also a copy of any ordinance passed pursuant to section 15 of said act.

Section 4. If bonds are to be issued pursuant to an act of the legislature entitled "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 27, 1893, and any assessment less in amount than fifty dollars remains unpaid for thirty days from the date of the warrant, or for five days after final decision on appeal, as provided in section 11 of said act, the mayor and common council may, by resolution, order such assessment paid from the street contingent fund, and the superintendent of streets shall thereupon release said assessment on the books of his office as upon payment in other cases.

Section 5. At the beginning of each month the superintendent of streets shall file with the city clerk a statement, verified by his oath, containing such items of expense of improvements made during the preceding month which could have been charged under the provisions of said act as incidental expenses; said statement shall also show what amounts have been collected and what disposition has been made thereof. The city clerk shall lay such statement before the mayor, who shall carefully examine the same, and if he finds that the provisions of said act in relation to the collection of incidental expenses have been observed, shall indorse his approval on said statement, and deposit it with the clerk. The mayor and common council shall not allow any claim for a service which could have been charged as incidental expenses under the provisions of said act, except when the work is abandoned before letting a contract, or unless such service was ordered by the mayor and common council before it was performed.

Section 6. All bids for public work shall be made upon printed forms, to be prepared by the superintendent of streets, and furnished gratuitously upon application, with a form for the affidavit hereinafter provided for, printed thereon. Each bid shall have thereon the affidavit of the bidder that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived, or agreed, directly or indirectly, with any other bidder or person, to put in a sham bid, or that any other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against said city, or any person interested in said improvement, for himself or any other person. No person, corporation, or firm shall be allowed to make or file or be interested in more than one bid for the same work. If, on the opening of said bids, more

than one bid appear in which the same person, corporation, or firm is interested, all such bids shall be rejected.

Section 7. No surety on any bond required under this article shall be taken unless he be a resident and freeholder in the state of California, and he shall justify (for which a form shall be printed on said bond) that he is such resident and freeholder, and that he is worth the amount for which he becomes surety over and above all his debts and liabilities in unencumbered real property, situated in said state, standing of record in his own name and assessed to him, and on which the taxes are not delinquent. Said bond shall be approved by the mayor. If such surety be a nonresident of the county of Santa Clara, his sufficiency shall be certified by the superior judge of the county where he justifies, whose certificate shall be indorsed on said bond before the same is presented to the mayor for approval. A bond of a surety company, organized and existing under the laws of the state of California, may be taken if approved by the mayor and common council.

Section 8. When the work under any contract shall have been completed, the contractor shall make out and file in the office of the superintendent of streets an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with anyone on his behalf, to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price, and no assessment shall be made until said affidavit is filed. Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work, other than the property owners who were parties to the agreements, and shall operate to void, as to such persons so defrauded, any assessment made for the work done under said contract.

Section 9. If any check or bond required to accompany a bid for work authorized by this article shall be forfeited for failure, neglect, or refusal of the bidder to enter into the contract to do said work, the mayor and common council shall not have power to relieve from, or remit such forfeiture unless it be shown by the contractor that errors have been made in the proceedings sufficient to vitiate the contract.

Article VIII, chapter II, section 1. An act of the legislature of the state of California entitled "An act to provide for laying out, opening, extending, widening, straightening, or closing up in whole or in part any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose," approved March 6, 1889, and any acts amendatory thereof or supplemental thereto, now or hereafter made, are hereby adopted as a part of this charter, and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act or acts conflict or are inconsistent with the provisions of this charter.

Article VIII, chapter III, section 1. The mayor and common council, with the advice of the city engineer, shall prescribe the location, form, and material to be used in the construction, reconstruction, and repairing of all public sewers, manholes, sinks, drainage, cesspools, and other appurtenances belonging to the drainage system, and of every private drain or sewer emptying into a public sewer, and determine the place and manner of the connection, and shall, by ordinance, prescribe the penalties of any violation thereof. Contracts for all of said work (excepting private sewers and drains) shall be based upon plans and specifications made by the city en-

gineer upon an order of the mayor and common council, shall be let in the same manner as prescribed in this charter for other contracts. The work shall be done under the supervision of the city engineer and superintendent of streets, and shall be accepted and paid for out of the sewer fund upon a certificate signed by both said city engineer and said superintendent of streets, stating that the work has been completed to their satisfaction and in every particular agreeable to said plans and specifications. The superintendent of streets shall be sewer inspector.

22. San Luis Obispo.

(Stats. 1911.)

Section 32. No officer, official or employee shall be directly or indirectly interested in any contract, work or business of the city, or in the sale of any article, the expense, price or consideration of which is paid for from the treasury or by assessment levied by any act or ordinance; nor in the purchase or lease of any real estate or other property belonging to the city or which shall be sold for taxes or assessments or by virtue of legal process at the suit of the city. No officer, official or employee shall be interested in, or in the employ of any public service corporation in the city or of any person, firm or corporation having any contract with the city or of any grantee of a franchise granted by the city.

Any contract or agreement made in contravention of this section shall be void.

Any violation of the provisions of this section shall be deemed a misdemeanor.

The council shall enforce the provisions of this section by appropriate legislation.

Section 40. (7) No action providing for the appropriation, acquisition, sale or lease of public property; for the levying of any tax or assessments; for the granting of any franchise; for establishing or changing fire limits, or for the imposing of any penalty, shall be taken except by ordinance: provided, that such exceptions be observed as may be called for in cases where the council takes action in pursuance of a general law of the state.

Section 45. As the legislative organ of the city, the council subject to the provisions and restrictions of this charter, shall have power:

(16) To compel the owner or occupant of buildings or grounds to remove dirt, rubbish and weeds therefrom and from the sidewalk and gutters adjacent thereto; and in his default to authorize the removal or destruction thereof by some officer of the city at the expense of such owner or occupant, and to make such expense a lien upon such buildings or grounds.

(40) To establish or change the grade of any street or public place.

(41) To grade or regrade to the official grade, plank or replank, pave or repave, macadamize or remacadamize, gravel or regravel, pile or repile, cap or recap, sewer or resewer, surface or resurface the whole or any part of any street, avenue, lane, alley, court or place within the city, and to lay and construct sidewalks, manholes, culverts, cesspools, gutters, tunnels, curbing and cross-walks, breakwaters, levees, or walls of rock or other material to protect the same and also any other work or improvement within the city; and to order any of the above work to be done in accordance with the general laws of the state of California. Also to provide for the care of shade trees planted therein and to cause shade trees to be planted, set out and cultivated therein. Also to order drainage or sanitary sewerage or storm-water sewers to be constructed on or through private property.

Whenever, in the judgment of the council or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessments on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto; provided, however, that at least one-fourth of the cost and expense of grading or regrading to the official grade, planking or replanking, paving or repaving, macadamizing or re-macadamizing, graveling or regraveling, piling or repiling, capping or re-capping, surfacing or resurfacing the whole or any part of any street, avenue, lane, alley, court or place within the city, shall be paid by the said city, out of such fund as the council may designate, and no special assessment as aforesaid for any of such work shall be made on private property nor become a lien on the same in amount greater than three-fourths of the total cost and expense of such work or improvement; and the council shall, before any assessment for any such work is made up, designate by resolution the proportion of the total cost and expense of the same to be paid by the municipality, which shall not be less than one-fourth thereof, and in making up such assessment there shall be deducted from the whole cost and expense such part thereof as has been so ordered to be paid out of the municipal treasury, and the remainder of said cost and expenses shall be assessed proportionately upon the lots, parts of lots and lands liable to be assessed therefor in accordance with the general laws of the said state of California.

(42) To open, extend, widen, straighten or close any street, lane, alley, court or public place within the city, or to order the same to be done in accordance with the general laws of the state of California, and to condemn and acquire any and all property necessary or convenient for that purpose.

Whenever, in the judgment of the council or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto, except that all the duties of the commissioners and secretaries shall be performed by or under the direction of the commissioner of public works of the city, who shall receive no compensation therefor.

(43) To provide for the lighting of the streets, highways, public places, and public buildings and for supplying the city with water for municipal purposes.

(44) Whenever any street or portion of a street shall be abandoned or closed by ordinance, to convey by deed such street or portion of street so abandoned or closed, to the owners of the lands adjacent thereto in such wise as the council shall deem that equity requires.

(47) To require every railroad company to keep the streets in repair between the tracks, and along and within the distance of two feet upon each side of the tracks occupied by the company.

Section 61. In the erection, improvement and repair of all public buildings and public works, in all street and sewer work, and in furnishing any supplies and materials for the same, or for any other use by the city, when the expenditure required for the same exceeds the sum of three hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after advertising for sealed proposals for the work contemplated for five consecutive days in the official newspaper. Such notice shall distinctly and specifically state the work contemplated to be done. Provided, however, the council may reject any and all bids, if deemed excessive, and re-advertise for bids, or may require the commission of public

works to submit a detailed estimate of what the work may be done for by the department of public works, and if such estimate is lower than the lowest bid, the council may order the work to be done by the department of public works, but the department of public works must not be allowed a larger sum to complete such work than called for by the aforesaid estimate. In case no bid is received, the council may provide for the work to be done by the department of public works.

Section 65. If at any time it shall be found that the person to whom a contract has been awarded has, in presenting any bid or bids, colluded with any other party or parties for the purpose of preventing any other bid being made, then the contract so awarded shall be null and void, and the council shall advertise for a new contract for said work, or provide for such public work to be done by the department of public works, as herein provided.

23. Santa Barbara.

Section 43. (Amendment, Stats. 1905, p. 933.) The council shall have power:

1. To establish or alter the widths and grades of, and to open, lay out, alter, extend, close, straighten, and otherwise regulate streets, avenues, alleys, lanes and sidewalks and cross-walks upon the same; and in or over any plaza, park, or grounds belonging to or under the control of the city, and to provide for acceptance of the streets when constructed and completed in accordance with such regulations as the council may adopt.

4. To establish a general system of sewers, conduits and storm drains in the city and to regulate the building and repairing thereof, and connections therewith.

6. To provide for and regulate street pavements, cross-walks, curbstones, grades, gutters, sewers, and cleaning and watering of streets.

Section 124. (Amendment, Stats. 1909, p. 1154.) (a) The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed upon the city council relating to:

1. The advertising for, and inviting proposals or bids for doing any work ordered by the city council to be done in or upon any streets, avenues, lanes, alleys, courts or places, or in construction of any sewer or drain, ordered by the city council in or over the right of way granted or required for such purpose.

2. The examining, considering, and declaring of such proposals or bids.

3. The awarding, letting and reletting of contracts for doing any of said work so ordered, the giving notice of such award, the rejection of proposals or bids, for doing such work, and the granting of extensions of time for the completion thereof by the contractor therefor.

4. The approval and the fixing of the amount of bond required to be given by contractors prior to, or at the time of executing contracts for such work, and the fixing of the time within which such work shall be commenced and completed.

5. The board shall also have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval of the award of contracts for any of the work mentioned in this section.

6. The board of public works shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon any commission provided for by law to assess the benefits,

damages and costs incident to a proposed change of grade of any public street, alley, lane or court.

(b) The president of the board of public works, shall have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval and fixing of the amount of bond required to be given by contractors prior to or at the time of executing contracts for such work.

(c) The secretary of the board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city clerk or the clerk of the city council relating to:

1. The receipt, care and custody of proposals or bids for doing any of the work mentioned in this section.

2. The care and custody of all checks and bonds accompanying such proposals or bids.

(d) The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the city council.

1. All of the public ways, streets, avenues, lanes, alleys, places and courts now open or which may hereafter be opened in the city of Santa Barbara; of the manner of their use and occupation; of all work and improvements done in, over, or under the same and of all excavations made in or under the same.

Section 163. (Stats. 1899, p. 485.) All streets, lanes, alleys, places and courts in said city now open and dedicated, or which may hereafter be opened and dedicated to public use, shall be kept in repair, so that the same shall be in good passable condition; and it shall be the duty of the street superintendent to keep all said streets, lanes, alleys, places and courts within the city limits in good repair, at the expense of the city.

24. Santa Cruz.

(Stats. 1907, p. 1105.)

Article II. The city of Santa Cruz shall continue vested with all the property of every kind now belonging to it and shall have power:

Fifteenth.—To establish and change the grade and to lay out, open, extend, widen, change, vacate, pave, repave, gravel, surface, resurface, and improve streets, alleys, sidewalks, crossings and other highways and public squares, parks and places and to make provisions for cleaning and sprinkling the same.

Article XVIII, section 1. Whenever the city council shall deem it expedient to establish the grade or alter the established grade of the whole or any part of any street, avenue, lane, alley, court or place in said city, the same shall be done by ordinance.

Article XVIII, section 2. The cost of providing cross-walks, and of improving all intersections of streets, including the cost of constructing sewers therein, and of the space included between the center line of the street to be improved and the prolongation of the sidelines of any street forming a junction with such street to be improved, to such center line, except the cost of constructing sewers therein, shall be paid out of the general or other appropriate fund of the city, and shall not be included in the special assessment for the proposed work. When a sewer is to be constructed in the last-mentioned space, one-half of the cost of said sewer shall be assessed against the property abutting against said space extended, and one-half of

said cost shall be paid out of the general or other appropriate fund of the city.

Article XVIII, section 3. Except as provided herein, the general laws of the state of California relative to the improvement of, and work upon streets, lanes, alleys, courts, places, and sidewalks, including the construction of sewers, and providing for the grading or laying out, altering the grade of, or for opening, extending, widening, straightening or closing up in whole or in part any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary and convenient for that purpose; and for providing a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and to provide for the payment of such bonds; and for providing for the planting, maintenance and care of shade trees upon streets, lanes, alleys, courts and places within municipalities, and of hedges upon the lines thereof, and for the eradication of weeds within the city limits, now in force, or which may be hereafter adopted by the legislature of this state, is hereby made a part of this charter, and shall govern the city council in such matters.

25. Santa Monica.

(Stats. 1907, p. 1007.)

Article II, section 1. The said corporation shall have the power:

(8) To lay out, open, extend, widen, improve or vacate, pave and repave streets and alleys, sidewalks and crossings, and other highways.

(11) To levy assessments upon property to pay for the improvements, and to collect the same, and to levy and collect taxes upon property for municipal purposes; . . . .

Article XVI, sec. 5. All acts of the legislature relating to the city of Santa Monica, and all city ordinances, resolutions and other regulations now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority; . . . .

26. Santa Rosa.

(Stats. 1905, p. 867.)

Section 31. The council shall have power to pass all such ordinances and to make all contracts and do all things, not inconsistent with the constitution of the United States and of this state, as they may deem necessary or desirable, as follows:

19. To lay out, alter, establish, widen, construct, improve, reconstruct, pave, gravel, grade, macadamize, bituminize, repair and keep in order all streets, alleys, sidewalks, crossings and gutters, bridges, bulkheads, and to establish, change or alter grades of any street, alley, sidewalk, crossing, bridge, bulkhead, gutter, or vacate the same, or any part of the same.

Section 66. Whenever a petition praying for the establishing, laying out, extending, widening, altering or opening of any street, lane, road, sidewalk, public square or public park, or for acquiring land therefor, or for acquiring any water system plant, land, water, water rights, rights of way, pipes, conduits and any and all easements, rights, privileges or appurtenances, or for acquiring any electric or gas plants, land, buildings, grounds, poles, pipes, wires, easements, and any and all rights of way, privileges or appurtenances for the supplying or furnishing additional water or water plant,

or electric light plant, or lights either of gas or electricity for said city or the inhabitants thereof, or for putting in, establishing, erecting or carrying on any electric or gas works for the purpose of lighting said city, or furnishing the inhabitants thereof with gas or electricity, or for exercising the right of eminent domain for any other purpose or use, signed by twenty-five or more resident citizens of said city, shall be presented to the council, it shall be read in council, and the hearing thereof set for the next regular meeting of the council, and all owners and claimants of the property affected by the said proceedings shall be given five days' notice of the pendency of such proceeding and of the time and place of the said hearing of the same, and at the time fixed for the hearing of said petition, or to which the hearing thereof may be adjourned, the said petition and any and all protests, if any, shall be read, considered and acted on in open session; and if the council shall deem the proposed establishing, laying out, extending, widening, altering, or opening of the street, lane, alley, road, sidewalk, public square, or public park, or for acquiring land therefor, or for acquiring any water system, plant, land, water, water rights, rights of way, pipes, conduits and any and all easements, rights, privileges, or appurtenances, or for acquiring any electric or gas plants, land, buildings, grounds, poles, pipes, wires, easements, and any and all rights of way, privileges or appurtenances, for the supplying or furnishing additional water, or a water plant or lights, electric light plant, or lights either of gas or electricity for the city or the inhabitants thereof, or for exercising the right of eminent domain for any other purpose or use, prayed for in the petition, to be a public necessity, they shall so declare by resolution entered upon their minutes, and shall order a survey to be made by a competent person, who shall make a survey and diagram of the same and report it to the council. The diagram and survey shall show the location and description of the particular rights, privileges or property which it is proposed to acquire for any of the purposes herein stated, and the land or property of each owner affected thereby, and the boundaries of the land and a general description of the property proposed to be taken.

Section 67. Upon filing said survey and diagram the city clerk shall issue a notice directed generally to all persons interested, setting forth that such petition has been filed, and the action of the council thereon, and that the survey and diagram has been made and filed, and that the same were in his office, open to the inspection of all persons interested and that proceedings would be instituted against nonconsenting property owners for the condemnation of the property required for public purposes or public use. Said notices shall be served on the nonconsenting property owners and may be served by any competent person above the age of twenty-one years by delivering a copy thereof to the person to be served, or by posting the same in a conspicuous place on the land of such nonconsenting property owner, and by publishing the same in a daily newspaper published in the city for five days. If any such owner shall not, within ten days after such service of said notice, either donate, sell or relinquish such land to the city for the purposes proposed, proceedings for condemnation shall be commenced in the name of the city in the court having jurisdiction.

Section 68. Any and all occupants and owners, or persons having any interest in the land sought to be condemned, may be joined as parties in the suit; and one action shall be sufficient against all persons owning, claiming or having any interest in the land or property sought to be taken.

Section 69. The record of the passage of the resolution of the council declaring the work a public necessity for public use, or if the land or prop-

erty sought to be taken is already a public use or quasi-public use that the purpose for which it is sought to be taken is of higher and greater public use, and that the taking of the land for the purposes, as herein provided, is a public use and is necessary, or that the taking thereof in such proceeding is of a higher and greater public use than that for which it is being used, shall be conclusive of the fact, and it shall also be conclusive that the petition was in due form and had been signed by the requisite petitioners; and it shall be prima facie evidence that the notices were in due form, and were served in all respects as required by law, and that the acts and things required to be done up to the passing of the resolution or making the order had been done in all respects as required by law. The right and jurisdiction to take and acquire any property rights as herein stated shall extend to and cover any such property rights, whether within or without the corporate limits of the city.

Section 70. All streets, sidewalks, lanes, alleys, places, courts, public squares or public parks now open or dedicated, or which may hereafter be opened or dedicated to public use, and all that have been used by the public for five years without interruption, shall be deemed and held to be open public streets, sidewalks, lanes, alleys, places, courts, public squares and public parks, and the council is authorized, empowered and has the right and jurisdiction to establish or change the grade of such streets, sidewalks, lanes, alleys, places, courts, public squares and public parks, and to fix the width and boundaries thereof, and to exercise full control over the same.

Section 71. Whenever the public interest or convenience shall require, the council is authorized and has the power and jurisdiction to order the whole or any portion of the streets, sidewalks, lanes, avenues, alleys, courts, public squares, places or public parks to be graded, graveled or regraveled, planked or replanked, paved or repaved, macadamized or remacadamized, piled or repiled, capped or recapped, or otherwise improved; and to order sidewalks made, placed or constructed, manholes, culverts, cesspools, gutters, tunnels, curbing and cross-walks to be laid, repaired, or improved; or to order any other work to be done which shall be necessary to complete the improvement of the whole or any portion of said streets, avenues, sidewalks, lanes, alleys, courts, places, public squares or public parks.

Section 72. Before ordering any of the work or improvement mentioned in section 71 of this charter the council shall pass a resolution of intention so to do, describing the work or improvements to be done, and a copy of said resolution, with the date of its passage, shall be posted in a conspicuous place on or near the front of the building in which the sessions of the council are held, or published for five days in a daily newspaper published in the city, and notices of a passage of said resolution signed by the street commissioner shall be posted conspicuously along the line of said proposed work at not more than one hundred feet in distance apart, and not less than three notices in all. Said notices shall be headed "Notice of Street Work" in letters of not less than one inch in length and in legible characters, stating the fact of the passage of the resolution, date of passage, and briefly the work proposed to be done, and shall refer to the resolution for further particulars. Said notices shall be posted at least ten days. The owners of two-thirds of the frontage of the property fronting on said proposed work, when the same is for one block or more, shall have twenty days from the first day of posting of said notice within which to make and file with the city clerk written objections to the proposed work of improve-

ment. Upon receiving such written objections, the city clerk shall indorse thereon the date of their reception by him, and such objections shall be a bar for six months to any further proceedings in relation to the doing of said work, unless the owners of two-thirds or more of the frontage as aforesaid shall meanwhile petition for the same to be done. When not more than two blocks, including street crossings or intersections, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on one or both sides upon said street has been so graded or otherwise improved, said council may order such work or improvement mentioned to be done upon said ungraded or unimproved part of said street notwithstanding such objections, and said work shall not be stayed or prevented by any written objections, unless the council shall deem the same proper.

At the expiration of the said twenty days, if no written objections by the owners of two-thirds of the frontage to the work of improvement in said resolution proposed to be done has been delivered to the city clerk as aforesaid, or if any written objections signed or purporting to be signed by the owners of two-thirds of the frontage is disallowed by said council, as not of itself barring said work, the council shall be deemed to have acquired jurisdiction to order any of the said work to be done, and all persons in interest shall be deemed to have had full notice and full opportunity to be heard, and shall be concluded from further hearing or objections. Before passing any order or resolution for the construction, making or doing of said work, plans and specifications and estimates of the costs and expenses thereof shall be furnished by the city engineer.

Section 73. If in the opinion of the council the public necessity requires any of the work mentioned in section 71 of this charter to be done, and that it is of more than local or ordinary benefit, the council shall have power and jurisdiction in such case to order such work to be done, and to pay a portion or all of the costs and expenses thereof out of any available funds in the city treasury; but if the council shall have power to apportion the whole of the costs and expenses of such work or improvement against the owners of property fronting on the line of such work or improvement according to the frontage of lots or land owned by each respectively. And if a portion is paid out of the city treasury the remainder of such costs and expenses shall be apportioned to and charged against the owners of property fronting on the line of said work or improvements authorized in this section, according to the frontage of lots or land owned by each respectively. If a portion or all of the costs and expenses of the work is to be apportioned and collected from the owners of the lots or land fronting on such improvement, the council shall comply with all of the provisions of section 72 of this charter in relation to the passage of a resolution of intention, posting of notices, filing of written objections, giving notices of hearing, making the order, and the acts and things required in said section to be done shall be done and performed in the same manner as is required when the whole of the costs and expenses of the said work is to be paid by the owners of property fronting on the line of the work.

Section 74. The owners of two-thirds of the frontage of lots and lands fronting on any street, sidewalk, avenue, lane, alley, place or court, or of lots of land liable to be assessed for the costs and expenses of the work which may be ordered, or their duly authorized agents, may petition the council to order any of the work mentioned in this charter to be done, and the council may order the work mentioned in this charter to be done; in which case the council shall proceed under section 72 of this charter, and

all of the provisions of said section 72 shall be complied with the same as though no petition for said work has been filed.

Section 75. When all of the costs and expenses, or a portion thereof, for the work in this charter provided is for work done upon any street, lane, alley, or sidewalk, and the same is to be apportioned and charged against the owners of property fronting on such work, such costs and expenses shall be apportioned to, charged against and collected from the owners of the property fronting upon the line of the work ordered to be done, and such owners shall be liable for such costs and expenses for all of the work embraced in the resolution or order, and such costs and expenses shall be apportioned against and collected from the owners of property fronting on the line of said work. In all cases of apportioning the costs and expenses against the owners of property, it shall be according to the number of front feet owned by each respectively. The costs of such work on street crossings or street intersections shall be paid by the city.

Section 76. Before ordering any contract to be let for any work provided for in this charter the street commissioner shall cause specifications to be made, one copy to be kept by the city clerk in his office for the inspection of bidders, and cause a copy and a notice to bidders to be posted conspicuously for five days on or near the front of the building in which the sessions of the council are held, inviting sealed bids for doing the work, and shall also cause a like notice to be posted up in at least two other public places in said city, and referring to the specifications posted or on file with the city clerk. All bids offered shall be accompanied by a check payable to the order of the mayor, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the bid. Said bid shall be delivered to the city clerk, and the council shall, in open session, examine and publicly declare the same. The council may reject any and all bids, and shall have the right to select the lowest responsible bid and to award the contract to the bidder thereof. The checks accompanying all bids not accepted shall be returned to the bidders who gave them; but the checks accompanying the accepted bid shall be held by said clerk until the contract for doing said work has been duly entered into and the bond required shall be given and accepted by the mayor, or until the owners of a majority of the frontage on said work shall elect to take the contract at the same bid, which they may do in five days after the bid has been announced; but if the bidder fails, neglects or refuses to enter into contract to perform said work for three days after the expiration of the five days allowed to property owners to take the bid, then the said check accompanying his bid and the amount therein mentioned shall be declared forfeited to and become the property of the city.

The owners of a majority of the frontage of lots and land upon the line of said proposed work, may, within five days from the declaring of the bid, elect to take said work and to enter into a written contract to do the whole work at the same bid, but should they fail to enter into a contract within the five days allowed for that purpose, then the successful bidder shall within three days thereafter enter into a contract with the city to do the work, and at the price specified in his bid. But should such successful bidder fail or neglect to enter into such contract in the time limited, the council shall have the right to declare the bid off, and the certified check and the money thereunder shall be forfeited to and become the property of the city, and shall be paid into the treasury, and the council shall again give notice for bids for said work as in the first instance, and shall award the contract to the then lowest responsible bidder. At the time of executing

any contract for work as herein provided, each contractor shall execute a bond to the satisfaction of the mayor, with two or more sureties, payable to the city, in such sums as the council shall deem adequate, conditioned for the faithful performance of the contract. The mayor is hereby authorized, in his official capacity, to take and receive all written contracts and bonds authorized under this charter and to do and perform any act required in relation thereto.

Section 77. In case the council is not satisfied with any bid or bids that may have been made for the construction and performing of the work it may, in case the owners of the majority of the frontage of lots and land do not elect to take said work and to enter into a written contract to do the whole thereof at a price agreeable to the council, that then the said council shall have the right to elect to do the work in the name of and for the city, and if for any reason the council is of the opinion that better work will be done and better material furnished and that it will be for the best interests of the city to have the work done in the name of and by the city, that then the council shall have the right, and it shall be its duty to do and perform such work and pay therefor out of the proper funds of the city, and the city shall have a lien upon all property fronting upon said street or streets, sidewalks or alleys where the said work shall be done, and the same shall be apportioned as in section 75 set forth, and the same shall be collected in such manner as the council shall direct.

Section 78. The street commissioner shall superintend any work herein authorized to be done which shall be commenced and prosecuted with diligence until completed, and the council may, for good cause, extend the time. The work must be done under the direction and to the satisfaction of the street commissioner. The materials used and the work done must comply with the specifications and to the satisfaction of the street commissioner. Neither the city nor any officer thereof shall be liable for any portion of the costs or expenses of the work, nor for any delinquency of persons or property assessed or liable therefor, except as provided in sections 73, 75 and 77 of this charter. The council may by ordinance prescribe the materials to be used and the mode of executing the work under all contracts in relation thereto. The assessment and apportionment of the costs and expenses of all such work shall be made by the street commissioner.

Section 79. Where the work done is the building, making or laying of sidewalks and curbing thereto on one side only of the street, or is work done on one side of the center line of a street, lane or alley, the lots and land fronting on that side on which the work is done only shall be assessed.

Section 80. When the width and grade of any street and sidewalk has been established the owner or owners of property thereon may, by permission of the council and under the supervision of the street commissioner, do the work of grading, graveling, macadamizing, paving or improving such street, and may grade such street to the established grade and gravel, macadamize, pave and put the same in order, and may make, lay and build sidewalks in front of their said property, if done to the satisfaction of the street commissioner, and in conformity to existing ordinances, rules and regulations and plans approved by the council. The expense of such work in this section mentioned shall be borne by such owners of property according to frontage.

Section 81. After the completion of any work done under contract as in this charter provided, and where the owners of property fronting on the

line of the work are to pay or be charged with the costs and expenses of the whole or a portion thereof the street commissioner shall make an assessment to cover the sum due for the work performed, including incidental and other expenses. Such assessment shall briefly refer to the contract, the work performed thereunder, the rate per front foot, the amount of each assessment and the amount each owner must pay and the name of the owner of each lot, if known; if not known, the word "Unknown" shall be written opposite to the number of the lot and the amount given thereon, the lot or portion of a lot and the front feet of each owner so far as can be ascertained, and the total number of front feet fronting upon the work, and liable for the assessment. The assessment shall have a diagram attached showing the location of the lots, the frontage of each owner, the street, cross streets and the number of feet assessed for said work. The said assessment shall have attached thereto a warrant signed by the street commissioner and may be substantially in the following form: "By virtue hereof, I (name), street commissioner of the city of Santa Rosa, county of Sonoma, state of California, do authorize and empower (name of contractor), or his assigns, to demand and receive the several assessments upon the assessment roll and diagram hereto attached, and this shall be his (or their) warrant for the same. (Date and signature)." The assessment diagram and warrant attached shall be recorded in the office of the city clerk, and shall be a lien upon the lots of land assessed respectively for one year from its date, and from and after the same shall be recorded all persons shall be deemed to have notice of its contents. If payment shall be made after such recording, satisfaction may be entered on the record thereof and the lien discharged. The lien, in any case, shall have no force or validity whatever after the expiration of said one year unless suit to foreclose the same shall have been commenced thereon within that time. At any time after the period of thirty days from the date of the warrant the contractor or his assigns may sue in his own name and foreclose the lien against the owner or persons having any interest in the lots or portion of lots of land assessed, and recover the amount of the assessment remaining unpaid, interest and costs, and also the sum of fifteen dollars as attorney's fees for foreclosing such lien. Such suit may be brought in the superior court of the county of Sonoma, state of California, and summons shall issue and be served in the manner required in other cases. Said warrant, assessment and diagram shall be prima facie evidence of the regularity and correctness of the assessment and the correctness of all of the proceedings, and of all of the acts, resolutions and orders of the council, and like evidence of the right of the plaintiff to recover in the action, and the said court shall have power to adjudge and decree a lien upon the lots of land and premises for the whole amount due from each lot owner, and to order the same to be sold on execution, as in other cases of the sale of real estate by the process of the court. Such sales shall be conducted in all respects in the same manner, as near as may be, and with like effect, as sales on execution, and the sections of the Code of Civil Procedure of the state of California in relation to sales on execution, certificates of sale, redemptions, deeds, and all other proceedings thereon, are made applicable hereunder. Such premises, if sold, may be redeemed as is provided by law in other cases. The Code of Civil Procedure of California governing appeals to the supreme court in civil cases shall apply to such cases. All provisions of this charter regulating street work shall be liberally construed, and all presumptions shall be indulged in favor of upholding the proceedings. If the work has been done substantially as required by the contract, no irregularity, error or mistake in any of the

proceedings, or any disregard, violation of or failure to comply with any of the requirements of this charter, or of any law or ordinance of the city, shall be a defense to the action to foreclose any lien provided for in this charter, or to any action to recover the amount of the assessment.

Section 85. The council may by ordinance provide any other or different procedure for the collection of the amounts due under the assessment for work done under this charter.

Section 88. The council shall have power to prescribe the location, form and materials to be used in the construction, building, making or repairing of all public sewers, manholes, sinks, drainage, cesspools and appurtenances belonging to the drainage system, and of private drains or private sewers, and to determine the place and manner of the connections, and to prescribe the penalties for any violation thereof. The council shall have power to construct, make, lay and build sewers, manholes, sinks, drainage cesspools and outlets. Contracts for all said work shall be based upon plans and specifications adopted by the council, and shall be let to the lowest responsible bidder, unless the council shall elect to do the work in the name of and for the city. The council shall provide by ordinance for the manner of letting contracts and the doing and completion of work under this section. The work mentioned in this section shall be done under the supervision of the street commissioner. The council shall provide for the payment of the contract price for the work in this section provided for in accordance with the contract and upon approval by the street commissioner.

27. Stockton.

(Amendment, Stats. 1905, p. 859.)

Section 30. The council shall have power to pass ordinances:

1. To establish or alter the grades of, and to open, lay out, close, straighten, widen, or otherwise improve or regulate streets, alleys, lanes, and sidewalks upon the same; determine the width of sidewalks and streets, and the grade of the same, and to provide for acceptance of the streets when constructed and completed, in accordance with such regulations as the council may adopt. Also, to open, lay out, and construct, alter, repair and vacate walks, cross-walks, avenues and thoroughfares in or over any plaza, park, or grounds belonging to or under the control of the city.

4½. To regulate and control the planting, cutting and removing of shade and ornamental trees on the streets, sidewalks, and public thoroughfares of the city.

5. To provide for and regulate street pavements, cross-walks, curbstones, grades, gutters, sewers, lighting, oiling and watering of the streets, avenues, and public places.

The charter as originally adopted in 1889 contained the Vrooman Act in full in sections 165 to 200, inclusive. These provisions were repealed in 1905. (Stats. 1905, p. 852.)

28. Vallejo.

(Stats. 1899, p. 370; Stats. 1907, p. 1252 ff.)

Section 200. When any street shall have been graded, paved or otherwise improved in accordance with the terms of this charter, and the costs of said improvements shall have been paid by the owners of the lots or lands adjacent thereto, and such grading, paving, or other improvements shall have been accepted and established, no change shall be made in the

grade of such street, unless on the petition of the owners of three-fourths of the property fronting on said street. Upon the filing of said petition with the city clerk, the board of trustees shall refer the same to the commissioners of public works, which shall determine whether the improvement described would be a public benefit, and shall report their decision to the board of trustees. If the report of said board should favor granting the request of the petitioners, the board of trustees shall proceed in the manner elsewhere in this charter provided.

Section 202. Said commissioners shall cause to be made all urgent repairs upon accepted streets, that may from time to time be requisite for public safety, and for that purpose may employ such laborers as may be necessary, and at such wages as is in this charter provided; but when the cost and expense of such repairs upon any accepted street, or portion of a street shall exceed the sum of two hundred dollars, exclusive of material to be furnished from the corporation material yard, if there be any such material on hand, the same shall be done under contract, awarded in the manner provided in this charter.

All work required to be done on any street, or part of any street, in said city which has not been accepted, shall be done at the expense of the owners of the property fronting on said street, or part of said street, and in the manner provided in this article; provided, that the board of trustees may provide for such repairs on unaccepted streets as the commissioners of public works may recommend as necessary to public safety; provided, also, that no greater sum than five hundred dollars shall be expended for that purpose in any one year.

Section 205. Whenever the board of trustees shall find, upon the estimates of the commissioners of public works, that the cost of any proposed work or improvement authorized by this charter will be greater than one dollar per front foot along each line of street so proposed to be improved, including the cost of intersection work assessable on said frontage, it shall have the power, in its discretion, to determine that serial bonds shall be issued to represent the cost of said work or improvement; said bonds to be issued, and the work to be done, in accordance with the provisions of an act of the legislature of the state of California, entitled "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 27, 1893.

Said serial bonds shall extend over a period not exceeding ten years from their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January of every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year, at the rate of not to exceed seven per cent per annum, on all sums unpaid, until the whole of said principal and interest are paid. Said bonds and interest thereon shall be paid at the office of the city treasurer, who shall keep a fund designated by the name of said bonds, into which he shall receive all moneys paid him for the principal of said bonds and the interest thereon, and from which he shall disburse such sums upon presentation of said coupons; and under no circumstances shall the said bonds or the interest thereon be paid out of any other fund. Said treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee, and indorser of each bond, and the number and amount of each coupon of principal or interest paid by him, and shall cancel and file each coupon paid.

Section 220. All streets, lanes, alleys, places or courts, in the city, now open or dedicated or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts for the purposes of this article; and the trustees are hereby empowered to fix the width and grade thereof, and to order to be done therein and thereon any and all street work and street improvement under the proceedings hereinafter described.

Section 221. Application for the doing of any such work or improvement must in the first instance, except where otherwise provided in this article, be made in writing to the board of public works; and if the expense thereof is to be assessed upon private property, the board shall investigate the same; and if it determine that such improvement is expedient, it shall so report to the trustees; and the trustees shall not order any such improvement until the same has been recommended by said board. When the construction of any sewer or drain shall involve a cost of more than five dollars per lineal foot for any block, it shall not be authorized except by an ordinance passed by the affirmative vote of not less than four-fifths of the members of the board of trustees. If an application is made for any work or improvement of which the expense is to be paid by the city, and the board of public works shall not approve of such application, it shall report to the trustees its reasons for such disapproval, and the trustees may then, after having obtained from the board of public works an estimate of the expense of said work or improvement, by ordinance passed by the affirmative vote of not less than four-fifths of the members of the board of trustees, order the doing of said work, or the making of said improvement.

The board of public works may also, except as herein prohibited, recommend any improvement, the expense of which is to be paid by the city, though no application may have been made therefor, and must make, with said recommendation to the trustees, an estimate of the expense, and in such case the trustees may order the same done.

No street work or street improvements of any kind shall be ordered to be done by the trustees unless a written recommendation to do the same has been made to them by the board of public works, and all such recommendations shall be made matters of record in the office of said board.

When the board shall recommend any work to be done on a street intersection or crossing, where the streets do not intersect each other at right angles, it shall in each such case determine what lots in the blocks adjacent to such intersection or crossing will be benefited by said work, and shall cause a map to be made on which shall be delineated the lots so to be benefited. Such map shall be transmitted to the trustees with said recommendation.

Section 222. Before recommending to the trustees the ordering of any work or improvement, the expense of which, or any part thereof, is to be assessed upon private property, the board of public works shall pass a resolution of its intention to recommend the same, specifying the work to be recommended, and shall fix a day when it shall take final action upon said resolution.

Upon the passage thereof the secretary of the board shall forthwith, without any further authority, cause a copy of said resolution to be posted conspicuously for five days in the office of said secretary, and to be published for a period of ten days (legal holidays excepted) and cause a copy to be deposited in the postoffice at the city, with postage prepaid, addressed to each person represented on the assessment-book of the city for the next preceding fiscal year as being owner of land liable to be assessed for said

improvement; but if said lot stand on said book in the name of unknown owners, such notice need not be sent.

The board shall also cause to be conspicuously posted along the line of said contemplated improvement, at points not more than one hundred feet in distance apart, notices not less than three in all, of the passage of said resolution. Each of said notices shall be headed "Notice of Street Work," in letters of not less than two inches in length, and shall in legible characters state the fact of the passage of said resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars.

Section 223. The owners of a majority of the frontage of the property fronting on said proposed work or improvement, and in the case of a district, those owning more than one-half of the superficial area of the district, may make written objections to the same within ten days after the expiration of the time of the publication of said resolution of intention, which objections shall be delivered to the secretary of the board of public works, who shall indorse thereon the date of its reception by him. Such objections shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the one-half or more of the frontage or of the district, as aforesaid, shall meanwhile petition for the same to be done, and the same shall, after the expiration of said six months, be continued under the resolution of intention first passed if said board shall deem proper.

If however, the owners of at least two-thirds of the property fronting on said proposed work or improvement, and in the case of a district, those owning at least two-thirds of the superficial area of the district, shall make written objections to the same within said six months, no further proceedings shall be taken under the aforesaid resolution of intention.

When the work or improvement proposed to be done is the construction of sewers, manholes, culverts or cesspools, and the objections thereto are signed by the owners of a majority of the frontage or of the district as aforesaid, the board shall at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The secretary shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice at the city, postage prepaid, and addressed to each objector or his agent when he appears for such objector. At the time specified the board shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive; and if said objections are overruled the proceedings shall be continued as though no objections had been made.

At any time before the making of the assessment as hereinafter provided, all owners of lots of land liable to assessment therein, who, after the first publication of the aforesaid resolution of intention, may feel aggrieved, or who may have objections to any proceedings in relation to the performance of the work described in said resolution, may file with the secretary a petition of remonstrance, wherein they shall state in what respect they feel aggrieved or the proceedings to which they object. Such petition or remonstrance shall be passed upon by the board, and its decision thereon shall be final and conclusive.

Section 224. When the contemplated work or improvement in the opinion of the board of public works is of more than local or ordinary public benefit, it may recommend to the trustees that the expense of such work or improvement be made chargeable upon a district, and said board shall in its reso-

lution of intention set out the district benefited by said work or improvement and to be assessed to pay the expense thereof. Objections to the extent and boundaries of the district of lands to be benefited by said work or improvement may be made by any interested party, in writing, within ten days after the expiration of the time of publication of the resolution of intention.

The secretary of the board shall lay said objections before it, and the board shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The secretary shall thereupon notify the persons making such objections by depositing a notice thereof in the post-office at the city, postage prepaid, addressed to each objector. At the time specified the board shall hear the objections urged and pass upon the same, and if said objections are overruled, its decision shall be final and conclusive as to the extent and boundaries of the district.

If the objections are sustained, the board shall proceed to set out another district to the extent and boundaries of which objections may be made and a hearing had thereon as above provided; and so on in like manner until a district has been set out to the extent and boundaries of which all objections shall be overruled by the board—its decision in that behalf to be final and conclusive; and thereupon the proceedings shall continue the same as if no objections had been made. In its report to the trustees the board shall accompany its report with a diagram on which shall be delineated each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work or improvement proposed to be done within the limits of the district. Such diagram shall be certified to be correct by the secretary of the board.

Section 225. When the work under any contract shall have been completed, the contractor shall make and file in the office of the board of public works an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with anyone on his behalf, to accept a price from him less than the price named in said contract, or to make any rebate or deduction to him from such price. Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work other than the property owners who were parties to the agreement, and shall make void, as to such persons so defrauded, any assessment made for the work done under such contract; and where there is more than one contractor each contractor shall make such affidavit.

Section 226. When any work in or upon any public street shall have been completed according to contract, and the affidavit mentioned in the next preceding section shall have been made, the board shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of this article, according to the nature and character of the work. The assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, the amount of each assessment, the name of the owner of each lot (if known to the board, and if not known, the word "unknown" shall be written opposite the number of the lot and the amount assessed thereon); the number of each lot assessed, and shall have attached thereto a diagram exhibiting the street or street crossing on which the work has been done, and showing the relative location of each distinct lot to the work done, numbered to correspond with the numbers in the assessment, and showing the number of front feet as-

sessed for said work. A mistake in the name of the owner shall not invalidate any assessment.

When the expense for such work falls in part upon any person, company or corporation having railroad tracks upon the street where such work has been done, said assessment shall include an assessment against said person, company or corporation, for its legal proportion of said expense, and the same shall constitute a lien upon the roadbed, rolling stock, franchises and other property of such person, company or corporation, for a period of two years from the date of recording the warrant, assessment and diagram hereinafter provided for.

Section 227. The expense of all work or improvement done upon any part of said streets, lanes, alleys, places or courts under the order of the trustees, shall be borne and paid for as follows:

First—The city shall pay out of the general fund the expense: (a) Of all work done on streets, crossings and intersections of streets that have been or may be accepted by the city, after the acceptance of the same, and all repairs and improvements deemed of urgent necessity that may be made upon the public streets and highways. (b) Of all work done in front of, or that may be assessed to property owned by the city, or by any department thereof. (c) Of all work done in front of, or that may be assessed to property owned by the United States:

Second—The expense of all sewers, cesspools, manholes, culverts and drains, and of all grading, planking, macadamizing, paving, piling and capping any street, or portion thereof and of all curbs thereon, and of all work done on sidewalks, shall be assessed upon the lands within the block or blocks adjacent thereto as herein provided, except where by an assessment district it may be provided otherwise.

Third—The expense of all work on such portion of any street required by law to be kept in order by any person, company or corporation, having railroad tracks thereon, shall be borne and paid for by such person, company or corporation, and shall be included in the assessment hereinbefore provided for.

No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment-book of the city.

Section 228. Subdivision One—Except where the expense incurred for the street work and improvement authorized herein is to be assessed upon a district as hereinafter provided, such expense, other than that to be paid by a person, company or corporation having tracks on the street where such work and improvement has been done, shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work.

Subdivision Two—The expense of all improvement except such as is done by contractors under the provisions of section sixteen of this article, until the streets, avenues, street crossings, lanes, alleys, places or courts are finally accepted, as provided in section twenty-three of this article, shall be assessed upon the lots and lands as provided in this section according to the nature and character of the work.

Subdivision Three—The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot on the quarter blocks

and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

Subdivision Four—Where a main street terminates in another main street, the expense of the work done on one-half of the width of the street, opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main street, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Subdivision Five—Where any alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street if it does not meet another.

Subdivision Six—The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place, or court, on either side respectively, or to the end of such alley, or subdivision street, if it does not meet another.

Subdivision Seven—Where a subdivision street, avenue, lane, alley, place, or court, terminates in another street, avenue, lane, alley, place or court, the expense of the work done on one-half of the width of the subdivision street, avenue, alley, place, or court opposite the termination shall be assessed upon the lot or lots fronting on such subdivision street or avenue, lane, alley, place or court so terminating, according to its frontage thereon, halfway on each side, respectively, to the next street, avenue, lane, alley, court or place, or the end of such street, avenue, lane, alley, place or court, if it does not meet another, and the other one-half of the width upon the lots fronting such termination.

Subdivision Eight—Where any work mentioned in this article, manholes, cesspools, culverts, cross-walks, piling, and capping excepted, is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered. When sewering or resewering is ordered to be done under this sidewalk or only on one side of a street for any length thereof, the assessment for its expense shall be made only upon the lots and lands fronting nearest upon that side, and for intervening intersections only upon the two quarter blocks adjoining and cornering upon that side.

Subdivision Nine—Any owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the trustees, may perform at his or their own expense (after obtaining permission from the board of public works so to do, but before said board has passed its resolution of intention to recommend grading inclusive of this) any grading upon said street, to its full width, or to the center line thereof, and to its grade as then established, and thereupon may procure at his or their own expense, a certificate from the city engineer setting forth the number of cubic yards of cutting and filling made by him or them in said grading,

and the proportions performed by each owner, and that the same is done to the established width and grade of said street, or to the center line thereof, and thereafter may file said certificate in the office of the board. Said certificate shall be recorded in a properly indexed book kept for that purpose in the office of the board. Whenever thereafter the trustees order the grading of said street, or any portion thereof, on which any grading certified as aforesaid has been done, the bids and contract must express the price of the cubic yard for cutting and filling and grading, and such owner or owners, and his or their successors in interest, shall be entitled to credit on the assessment upon his or their lots and lands fronting on said street for grading thereof, to the amount of the cubic yards of cutting and filling set forth in his or their said certificate, at the prices named in the contract for said cutting and filling; or, if the grade meanwhile has been legally changed, only for so much of said certified work as would be required for grading to the grade as changed. Such owner or owners shall not be entitled to any credit that may be in excess of the assessment for grading upon the lots and land owned by him or them, and proportionately assessed for the whole of said grading. The board shall include in the assessment for the whole of said grading upon the same grade the number of cubic yards of cutting and filling set forth in any and all certificates so recorded in his office, or for the whole of said grading to the changed grade so much of said certified work as would be required for grading thereto, and shall enter corresponding credits, deducting the same as payments upon the amounts assessed against the lots and lands owned respectively by said certified owners and their successors in interest; but he shall not include any grading quantities or credit any sums in excess of the proportionate assessments for the whole of the grading which are made upon any lots and lands fronting upon said street and belonging to any such certified owners, or their successors in interest. When any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work, except grading, on such street, in front of any block, at his or their own expense, and the trustees shall subsequently order any work to be done of the same class in front of the same block, the work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, as provided in subdivision ten of this section; but the work so done at the expense of such owner or owners shall be upon the official grade, and in condition satisfactory to the board of public works at the time said order is passed.

Subdivision Ten—The board of public works may include in the resolution of intention any of the different kinds of work mentioned in this article, and it may except therefrom any of said work already done upon the street to the official grade. The lots and portions of lots fronting upon said accepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made; but this shall not be construed so as to affect the special provisions as to grading contained in subdivision nine of this section.

Subdivision Eleven—When the resolution of intention declares that the expense of the work and improvement is to be assessed upon a district, immediately after the contractor has fulfilled his contract to the satisfaction of the board of public works or to the satisfaction of the trustees on appeal, the board of public works shall proceed to estimate upon the lands, lots, or portions of lots within said assessment district, as shown by the diagram provided for in section five of this article, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece

or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the expense of such proposed work, and in so doing shall assess said total sum upon the several pieces, parcels, lots or portions of lots, and subdivisions of land in said district benefited thereby, to wit: Upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in this article.

Section 229. If at any time there shall be any street work or improvement done, and none of the methods hereinbefore provided are legally sufficient to authorize the board of public works to make an assessment to pay for the expense thereof then said board shall, before it passes a resolution of its intention to recommend the ordering of said work or improvement, establish by resolution a method by means of which such assessment shall be made; and on the completion of the work or improvement to the satisfaction of said board, or to the satisfaction of the trustees on appeal, said board shall make an assessment to pay the expense thereof according to the method established by said resolution.

Section 230. In making all assessments the board of public works shall act as a board, and the assessment shall be authenticated by the signatures of all the members thereof.

Section 231. To said assessment shall be attached a warrant which shall be signed by the president of the board of public works and countersigned by the secretary thereof. Said warrant shall be substantially in the following form:

By virtue hereof the board of public works of the city of Vallejo, by the authority vested in it, does authorize and empower (name of contractor) his (or their) agents, or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his (or their) warrant for the same.

(Date) ——. (Name of president of board of public works.)

Countersigned by (name of secretary of board of public works).

Said warrant, assessment and diagram, shall be recorded in the office of the board. When so recorded the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed, respectively for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment and diagram, all persons interested in said assessment shall be deemed to have notice of the contents of the record thereof.

After said warrant, assessment and diagram are recorded, the same shall be delivered to the contractor, or his agent or assigns, on demand, but not until after the payment to the board of the incidental expenses not previously paid by the contractor or his assigns. By virtue of said warrant said contractor, or his agents or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments.

When it shall appear by the final judgment of any court in this state having jurisdiction to render such judgment, that any suit brought to foreclose the lien of any assessment for street work made under this article, or in the recording thereof, has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality, thereof or therein, or in the return on the warrant issued pursuant to any such assessment, or in the recording of any such warrant any person interested therein may, at

any time within seven months after the entry of said final judgment, apply to the board for another assessment to be issued in conformity to law; and the board shall, within sixty days after the time of said application, make and deliver to said applicant a new assessment, diagram and warrant in accordance with law, and sign, record and authenticate the same as above provided. Such assessment shall be a lien upon the lots of land set out therein for the period of two years from the date of its recording, and suit may be brought to enforce said lien as provided in this article. Should such final judgment be that of the superior court of the county of Solano and an appeal therefrom to the supreme court of the state has been taken, no such other assessment shall be made until said appeal has been determined.

Section 232. The contractor, or his assigns, or some person on his or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made, the contractor, his assigns, or some person on his or their behalf, shall receipt the same upon the assessment in the presence of the person making such payment, and shall also give a receipt if demanded. When the person so assessed, or their agents, cannot conveniently be found, or when the owner of the lot is stated as "unknown" upon the assessment, then said contractor or his assigns, or some person on his or their behalf, shall publicly demand payment on the premises assessed.

The warrant shall be returned to the board of public works within thirty days after its date with a return indorsed thereon, signed by the contractor or his assigns, or some person on his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid in whole or in part, and the amount thereof. Thereupon the secretary of the board shall record the return so made in the margin of the record of the warrant and assessment.

The board can at any time receive the amount due upon any assessment and warrant issued by it and give a good and sufficient discharge therefor; but no such payment so made after suit has been commenced shall operate, without the consent of the plaintiff in the action, as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff.

The board may release any assessment upon the books of its office on the payment to it of the amount of the assessment with interest, against any lot or on the production to it of the receipt of the party or his assigns to whom the assessment and warrant were issued. If any contractor shall fail to return his warrant within the time and in the form provided in this section he shall thenceforth have no lien upon the property assessed; but if any warrant is lost, upon proof of such loss, a duplicate may be issued, upon which a return may be made with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of seven per centum per annum until paid.

Section 233. The owners, whether named in the assessment or not, the contractor or his assigns, and all other persons directly interested in any work provided for in this article, or in the assessment, feeling aggrieved by an act or determination of the board of public works in relation thereto, or who claim that the work has not been performed, according to the contract, in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the board, shall, within thirty days after the date of the warrant appeal to the trustees, by briefly stating their objections in writing,

and filing the same with the clerk of the trustees. Notice of the time and place of hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days. Upon such appeal the trustees may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the board relative to said work, may confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to them shall seem just; and require the work to be completed according to the directions of the trustees, and may at their option direct the board of public works to correct the warrant, assessment or diagram, in any particular or to make and issue a new warrant, assessment and diagram to conform to the decisions of the trustees in relation thereto.

All the decisions and determinations of the trustees upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities, which the trustees might have remedied and avoided; and no assessment shall be held invalid, except upon appeal to the trustees, as provided in this section, for any error, informality or other defect in the proceedings prior to the assessment, or in the assessment itself, where the board of public works has acquired jurisdiction to make the same.

Section 234. At any time after the period of thirty-five days from the day of the date of the warrant, or if an appeal has been taken to the trustees, then, at any time after five days from the decision of the trustees on such appeal, or after the return on the warrant, after the same may have been corrected, altered, or modified, as herein provided, but not less than within thirty-five days from the date of the warrant, the contractor or his assignee may sue in his own name the owner or the mortgagee of the land, lots, or portions of lots assessed on the day of the date of the recording of the warrant, assessment and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of seven per centum per annum until paid.

In all cases of recovery under the provisions of this article the plaintiff shall recover the sum of fifteen dollars in addition to the taxable costs, as attorney's fees, but not any percentage upon said recovery. When suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees in addition to all taxable costs, notwithstanding that the suit may be settled or a tender be made before a recovery in said action, and he may have judgment therefor.

Said warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the board of public works and of the trustees upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the lots of land assessed, and to order such premises, to be sold on execution as is in other cases of the sale of real estate by the process of said courts. In all actions brought to enforce the lien of assessments made pursuant to the provisions of this article the proceedings therein shall be governed and regulated by the provisions of this article, and, when not in conflict herewith, by the codes of this state.

Section 235. When any portion of the roadway of any street, avenue, lane, alley, court, or place, or any portion of any sidewalk in the city, none of which has been accepted by the trustees as in this article provided, shall be so out of repair as to endanger persons or property passing thereon, or so as to interfere with the public convenience in the use thereof, the board of public works shall require the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court, or place, by a notice in writing, to be delivered to them or their agents personally, to repair forthwith said portion of said street, avenue, lane, alley, court or place, to the center line thereof, in front of the property of which he is the owner or tenant, or occupant. The board shall particularly specify in said notice what work is required to be done and what material shall be used in said repairs. If said repairs be not begun within five days after notice given as aforesaid and diligently and without interruption prosecuted to completion, the board may make such repairs, or enter into contract with any suitable person, at the expense of the owner, tenant, or occupant, after the specifications for the doing of said work shall have been conspicuously posted by it in its office for three days, inviting bids for the doing of said work. Said bids shall be delivered to it at its office on or before the second day after the completion of said posting, and opened by it on the next day following, whereupon the contract shall be awarded to the lowest responsible bidder.

All of said bids shall be preserved in the office of the board, and shall be open at all times after the letting of the contract, to the inspection of all persons; and such owner, tenant, or occupant, shall be liable to pay said contract price. Such work shall be commenced within twenty-four hours after the contract shall have been signed, and completed without delay to the satisfaction of the board. Upon the completion of such repairs by the contractor as aforesaid to the satisfaction of the board, it shall make and deliver to the contractor a certificate to the effect that such repairs have been properly made by said contractor to the grade, and that the charges for the same are reasonable and just, and that the board of public works has accepted the same.

Section 236. If the expense of the work and material for the repairs provided for in the last preceding section be not paid on demand to the contractor so employed, or his agent or assignee, said contractor, or his assignee, shall have the right to sue such owner, tenant or occupant for the amount contracted to be paid; and the certificate provided for in said section shall be prima facie evidence of the amount claimed for said work and materials, and of the right of the contractor to recover for the same in such action. Said certificate shall be recorded by the board of public works in a book kept by it in the office for that purpose, properly indexed, and the sum contracted to be paid shall be a lien as in case of other assessments provided for in this article.

Section 237. In addition to the remedies above given the trustees may prescribe the penalties that shall be incurred by any owner or person neglecting or refusing to make repairs when required, as hereinbefore provided. Such penalties shall be enforced for the use of the city by prosecution in the name of the people of the state of California in the court having jurisdiction thereof and may be applied in the case of fines, to the payment of expense of any such repairs not otherwise provided for.

Section 238. The person owning the fee, or the mortgage of such fee, or the person who, on the day the action is commenced, appears by deed

duly recorded in the county recorder's office of the county of Solano, to have the legal title to the land, or the person in possession of lands, lots, portions of lots or buildings under claim, or exercising acts of ownership over the same for himself, or as executor, administrator or guardian of the owner, shall be regarded, treated, and deemed to be the "owner" for all the purposes of this article. And in case of property leased, the possession of the tenant or lessee holding and occupying under such person shall be deemed to be the possession of such owner.

Section 239. Any tenant or lessee of any lot of land on which has been imposed an assessment under the provisions of this article may pay said assessment, or he may discharge any liability imposed thereon by virtue of the provisions of this article, or he may redeem the property within the time prescribed by law, if legally sold on execution, and may deduct the amount so paid from the rents due and to become due from him; and he shall have a lien upon, and may retain possession of, said lots until the amount so paid and advanced with legal interest thereon, be satisfied from accruing rents or by payment by the owner.

Section 240. The records kept by the board of public works shall have the same force and effect as other public records, and duly certified copies therefrom may be used in evidence with the same effect as the originals. Said records shall, during all office hours, be open, free of charge, to the inspection of any citizen wishing to examine them.

Section 241. Notices in writing required to be given by the board may be served by any person over the age of twenty-one years, and the fact of such service may be verified by the oath of the person making it. Such oath may be taken before the secretary of said board or before any member thereof.

Section 242. When any street or portion of a street has been or shall hereafter be fully constructed to the satisfaction of the board of public works and of the trustees, and is in good condition throughout and a sewer, gas-pipes, and water-pipes are properly laid therein the same shall be accepted by the trustees by ordinance; and thereafter such street or portion of a street shall be kept in repair and improved by the city. The trustees shall not accept any portion of a street less than the entire width of the roadway, including the curbing, and one block in length, or one entire crossing; but they may partly or conditionally accept any street, without sewer, or gas-pipes, or water-pipes therein, if the ordinance of acceptance expressly states that they deem such sewer, or gas-pipes, or water-pipes to be then unnecessary. In such case the lots of land previously or at any time assessable for the cost of constructing a sewer shall remain and be assessable for such cost and for the cost of repairs and restoration of the street damaged in said construction, whenever the trustees shall deem a sewer to be necessary and shall order it to be constructed. The board of public works shall keep in its office a register of all streets accepted by the trustees under this section, which register shall be indexed for easy reference thereto.

Section 243. The board of public works may at any time, without any application therefor, recommend to the trustees to order the paving or macadamizing of the portion of any street required by law to be paved or macadamized by the person, company or corporation having railroad tracks thereon. Upon said recommendation the trustees shall by ordinance order said work to be done and direct said board to notify said person, company, or corporation of the fact of the passage of such ordinance.

The secretary of said board shall thereupon forthwith in writing notify said passage of said ordinance; and if said person, company or corporation shall not within ten days after receiving said notice commence in good faith to do said work and prosecute the same diligently to completion, the board shall invite sealed proposals for doing said work in the manner provided in this article; and all the provisions of this article in regard to such proposals, to the awarding of contracts, to the execution of contracts, and to the doing of public work, shall apply to all similar proceedings taken under this section. On the completion of the work to the satisfaction of the board the contractor shall be entitled to recover from such person, company or corporation, the contract price for the expense of said work, together with incidental expenses, in an action instituted in a court of competent jurisdiction. On the trial of such action, the certificate of the board on completion of said work to its satisfaction shall be prima facie evidence of the regularity of all the proceedings prior thereto and of plaintiff's right to recover in said action.

Section 244. Except as otherwise in this article specifically provided, no ordinance for the improvement of any street other than for sewers, sidewalks or curbs, except for the improvement of the streets constituting or lying along the water front of the city, and except for such work as is provided for in the next preceding section shall be passed by the trustees without extending said improvement throughout the whole width of such street.

Section 245. Wherever in this article the word "street" occurs, it shall be held to include all streets, lanes, alleys, places and courts which have been, or may be hereafter, dedicated and open to public use, and whose grade and width have been legally established; and the grade of all intermediate or intersecting streets in any one block shall be deemed to conform to the grades as established at the crossings of the main streets.

The word "improvement" shall be held to include grading, paving, planking, macadamizing, piling, and capping; and the construction and repairs of sewers, cesspools, manholes, culverts, drains, sidewalks, and curbs.

The term "main street" shall mean such street or streets as bound a block, and the term "street" shall include crossing.

The word "block" shall mean the blocks known or designated as such upon the maps and books of the assessor.

The term "quarter block" as used in this article as to irregular blocks, shall be deemed to include all lots or portions of lots, having any frontage on either intersection street halfway from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city.

The word "paved" shall include any pavement of stone, iron, wood, or other material which the trustees may by ordinance order to be used; but no patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon its streets under any contract that may be awarded to him, or entered into by him with the city.

The term "expense" shall include the price at which the contract was awarded, and the term "incidental expenses" shall include all expenses incurred in printing and advertising the work contracted for, and all expenses for surveying, measuring and inspecting the work.

All notices and resolutions required in this article to be published shall be published daily, legal holidays excepted, in a newspaper published in said city.

All notices herein required to be served, whether by delivery, mailing or posting, may be so served by any male citizen of the age of twenty-one years, and his affidavit thereof shall be prima facie evidence of such service. The affidavit by the publisher of the newspaper, or his clerk, of the publication of any notice required in this article to be published, shall be prima facie evidence of such publication.

Section 246. When the owners of all the lands fronting upon any street which is less than sixty feet in width, for the entire distance of said street, or for the distance of one or more entire blocks, shall petition the board of public works that the said street or that portion thereof upon which said lands front, be closed, the board may pass a resolution recommending that the same be closed. Before passing such resolution the board shall cause a notice of the application to be published in a newspaper, in said city, and shall fix a time and place at which it will consider the same and hear objections thereto. Upon such hearing it shall determine whether it will recommend that the street be closed; and if it shall so determine, it shall transmit such recommendation to the trustees. Thereupon the trustees may pass an ordinance that the street be closed; and the same shall not thereafter be, or be deemed to be, a public street, or subject to any public expense or improvement; and the land theretofore included within the roadway and sidewalks of said street shall thereafter be the property of the city. No such ordinance shall be passed until the petitioners shall have paid all the expenses of said proceedings.

29. Watsonville.

(Stats. 1903, p. 648.)

Article II, section 12. Subject to the provisions, limitations and restrictions in this charter contained, the board of aldermen shall have power:

4. To lay out, open, extend, alter and close streets, avenues, lanes, alleys, courts and public places within said city and to fix and alter their official grades; to grade, pave, curb, sidewalk, sewer, drain and otherwise improve the same; to provide for the repair, cleaning and watering thereof; to manage and control such streets, highways and places and to regulate the use thereof; to regulate or prohibit the placing or maintaining of hitching posts, trees, signs, awnings, and other obstructions therein, and to remove obstructions therefrom.

Article XI, section 1. An act of the legislature of the state of California, entitled: "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, as since amended and as herein amended, is hereby adopted as part of this charter and shall have the same force and effect as if incorporated at length herein except where the provisions of said act conflict or are inconsistent with the provisions of this charter; and no repeal of said act shall affect its applicability to the city of Watsonville.

Article XI, section 2. The board of aldermen, with the approval of the mayor, may order any street, lane or alley to be improved in any manner provided for in the above named act, whether a majority of the property owners whose property fronts on such street, alley or lane, desire said improvement or not; but no street, alley or lane may be so improved against the will of said property owners or the owners of a majority of the property fronting on said street, alley or lane where the cost of such improve-

ment shall exceed one dollar per front foot for each side of said street, alley or lane.

Article XI, section 3. An act of the legislature of the state of California entitled "An act to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane, alley, court or place within municipalities and to condemn and acquire any and all land and property necessary or convenient for that purpose," approved March 6, 1889, and any acts amendatory thereof or supplemental thereto now or hereafter made, are hereby adopted as a part of this charter and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act or acts conflict or are inconsistent with the provisions of this charter, and no repeal of such act shall affect its applicability to the city of Watsonville.

III. TEXT OF PROVISIONS OF SPECIAL ACTS INCORPORATING CITIES.

1. Alviso, p. 1186.
2. Gilroy, p. 1186.
3. Marysville, p. 1192.
4. Nevada City, p. 1192.
5. Santa Clara, p. 1194.

1. Alviso.

(Stats. 1852, p. 222.)

Section 1. The town of Alviso, in the county of Santa Clara, is hereby declared to be incorporated under the provisions of the act entitled "An act to provide for the incorporation of towns," approved March twenty-seventh, eighteen hundred and fifty, subject to the changes hereby expressly made."

"An act to provide for the incorporation of towns." Stats. 1850, p. 128.

Section 6. The board of trustees shall have power . . . . to lay out, alter, keep open, and repair the streets and alleys of the town. . . . .

2. Gilroy.

(Stats. 1870, p. 263.)

Section 9. (Amendment, Stats. 1872, p. 356.) They [the common council] shall have power . . . . to lay out, alter, open, improve, cleanse and repair the streets and sidewalks.

Section 14. The common council are hereby authorized and empowered to order the whole or any portion of any street or streets, lane or lanes, alleys, courts or squares, graded or regraded to the official grade, paved, graveled or macadamized, and have the same repaired; to order sidewalks, culverts, sewers, drains and curbings constructed and repaired; to improve and beautify the public squares, and to order any other work to be done which shall be necessary to make and complete the whole or any portion of the said streets, sidewalks, lanes, alleys and squares, as in their opinion the public good and convenience requires.

Section 15. The common council may order any of the work herein authorized to be done, after a notice of their intention so to do, in the form

of a notice of intention, describing the proposed work, signed by the clerk—after being published for two consecutive weeks. At the expiration of the time as given in any such notice of intention, said common council shall be deemed to have acquired jurisdiction to order any of the work herein provided for to be done; and all owners of lands or lots, or portions of lots, who may feel aggrieved, or who may have objections to any of the subsequent proceedings of the common council in relation to the work proposed and described in the notice of intention, shall file with the city clerk a remonstrance, wherein they shall state in what respect they feel aggrieved, and their reasons for objecting to the proceedings. Said remonstrance shall be considered by the common council, and their decision thereon shall be final and conclusive; provided, that if more than one-half of the owners or occupants, or the owners or occupants of more than one-half of the real estate fronting on any street, lane, alley or square on which as a whole said work or improvement is proposed to be done, shall remonstrate against said work or improvement, said common council shall then suspend further proceedings for the term of six months, unless such owners or occupants aforesaid shall sooner petition the common council to have such improvements made; and it being further provided, that if at any time of the hearing of such remonstrance against said work or improvements, or at any time subsequent thereto, it shall come to the knowledge of the common council that said proposed improvements, or any portion of them, are an immediate public necessity, they shall then proceed in reference to said proposed work or improvements, or so much thereof as they may deem and declare to be necessary, as if no remonstrance had been made.

Section 16. It shall be the duty of the common council to cause an immediate survey of any such proposed work or improvements, to be made by the city or some other competent surveyor, who shall, on the conclusion of said survey, produce a map or diagram indicating the proposed grade, and the amount of excavation or filling in front of each person's real estate to the middle of the streets; all lots on the corners of blocks to include the cross-streets; or if the improvements only extend to the sidewalks, then he shall indicate, as aforesaid, the amount of excavation or filling of the sidewalks in front of each person's real estate. If the common council approve the survey, diagram and specifications of the surveyor, the same shall be placed on file in the office of the city clerk; and they shall order said improvements to be made, and shall cause such order to be published for at least three consecutive weeks in some newspaper published in the city of Gilroy. At the expiration of such notice, the common council may determine, by ordinance or resolution, at what time said work or improvements shall be commenced, and within what time all of which shall be completed; and also may, in their discretion, extend the time so fixed; and such of the persons having frontage on the line of the proposed work or improvements, shall have the privilege of doing the same in accordance with the requirements of the order, survey, diagram and specifications of the surveyor on file in the office of the clerk, as aforesaid; but if the owner or occupant of any such real estate fail or neglect so to do within the time fixed for doing the same, or within any extension of time which may have, in the discretion of the common council, been granted, it shall be the duty of the city marshal to let out, in a manner described by the resolution or ordinance of the common council, the doing of all the work or the making of all the improvements remaining unfinished; and when the doing of all such work, or the making of all such improvements shall have been finished and accepted by the surveyor and city marshal, they shall certify the same

to the common council, who shall order the city clerk, as ex-officio city assessor, to make an assessment of the cost thereof, as apportioned to each of the persons or occupants owning or occupying said real estate—which said assessment shall constitute a lien upon such real estate, dating from the time such work or improvements was ordered—and after due notice, present the same to the common council, who shall, on a specified day, sit as a board of equalization thereon, and shall hear and determine in reference thereto in manner as is required for the equalization of other city taxes; and all persons feeling aggrieved in reference to any such assessment, shall, at such time, either in writing or otherwise, specifically make known the cause of their objections and complaint, which shall be heard and passed upon by said board of equalization, and their determination therein shall be final and conclusive; and when thus equalized and approved by them, said list shall be properly certified by the city clerk and placed in the hands of the city marshal for collection; and all subsequent proceedings in relation thereto shall be the same as prescribed herein for the collection of other city taxes, as far as the same may be applicable.

Section 17. The cost of the survey, specifications, maps or diagram of any of the work or improvements hereinbefore mentioned, together with all culverts and street crossings, shall be paid by the city.

Section 18. When any street or portions of any street, or the sidewalks or any portions thereof, becomes in a condition to be dangerous, or in a condition to cause great public inconvenience, the city marshal shall, by notice in writing, to be delivered to them personally, or posted on the premises of the owners, occupants or tenants, upon any real estate in front of which such repairs or improvements are required to be made, require them to make such improvements or repairs forthwith, particularly specifying in such notice what improvements or repairs are required to be made. If such improvements or repairs are not commenced within three days after notice given as aforesaid, and diligently prosecuted to completion without unnecessary delay, the city marshal shall be deemed to have acquired jurisdiction to contract for the doing of the work or improvements required by said notice, and may enter into a contract with any competent person to make the required improvements or repairs at the expense of the owner of such real estate, at such price as he may deem reasonable and just, and such owner shall be liable to pay the same; and such sum or sums of money contracted to be paid for said work or improvements shall be a lien upon the real estate in front of which, to the middle of the street, said work or improvements shall have been made, and may be collected by civil action from the personal effects of such owner or owners, or a tax levied or assessed and equalized, as provided in section sixteen of this act; and all money collected by the city marshal for the construction, improvements or repairs of any street, lane, alley or sidewalk, if collected by an assessment duly equalized and certified, shall be paid to the city treasurer, as a special fund, to the credit of the particular object for which it was assessed; or, if collected by voluntary payment or by civil action, from the personal effects of the owner of such real estate, he shall pay the same over to the contractor, taking his receipt therefor, a duplicate of which he shall file with the city clerk; and for all assessments made upon real estate for the construction, improvement or repairs of any street, lane, alley or sidewalk, such an amount shall be added to each and every of such assessments, in addition to the contract price thereof, as will be sufficient to pay the fees of the collector and treasurer, as allowed by law.

Section 19. The city or the proper authorities thereof shall not be held responsible for nor assume the payment of any money for work done or repairs and improvements made until after all demands on the owners or occupants of such real estate have been paid or prosecuted to final collection; and in case of failure on the part of the city to collect such taxes from the owner or occupant, or from the real estate, the person or persons having contracted for, done and completed any part of or the whole of such work done, or repairs and improvements made, may present the same to the common council and be allowed and paid therefor from the general fund of said city.

Section 22. The common council of the city of Gilroy shall, whenever a petition signed by twenty-five citizens of said city, praying for the opening of any new street or streets, or the extending, widening, altering or vacating of any street or streets, lanes or alleys in said city, if deemed by them a public necessity, direct by ordinance the city surveyor to make an accurate survey of any such proposed street or streets, lane or alleys, and return the same to the common council at its next regular meeting, or within such time as the common council shall by ordinance or resolution direct. Said survey shall be accompanied with a report and diagram map, showing the location of such proposed street or streets, lane or alley, and the width thereof; also the boundaries of the lands of each owner thereof through whose land such street or streets, lane, or alley are proposed to be located, widened, altered or vacated. And for the purpose of making such surveys, the surveyor shall have the right to enter upon any and all lands; but the city shall be liable to the owner or owners for any injury done to any such premises by reason of such entry.

Section 23. Within ten days after the filing of such report and map of the proposed work, the city attorney shall, by careful examination of the records of the county, ascertain and report to the common council, the names of all owners of any such lands, as the same shall appear of record, with the description of the land belonging to each person. Upon the filing of the report the city clerk shall issue notice, directed generally to all persons interested, setting forth that such petition has been filed and that the survey of such proposed street or streets has been made, and that the names of the owners and occupants of the lands through which said street or streets will run are thereon designated; and also a statement that proceedings will be instituted for the condemnation of such lands for public purposes, unless all such owners shall, within ten days of the date thereof, make, execute and deliver to the city deeds of donation of the lands sought to be so appropriated; said notices shall be served by the city marshal, by posting copies of the same in some conspicuous place on the premises belonging to each owner. If, after the expiration of said ten days, all or any of said owners shall fail to donate said lands for such purposes, the city attorney shall file in the clerk's office of the district court, in the county of Santa Clara a petition, stating therein that the petition referred to in the twenty-third section was duly presented to the common council; that such survey had been made, the description by metes and bounds, or by some accurate designation of said street or streets, and the width thereof, which in no case shall exceed one hundred feet; the description of the tracts of land belonging to each person through which such street or streets will run, and the description and amount of land taken by such street or streets from each of said owners; that the said last named tract or tracts of land are necessary for said purposes, and the names of the persons in possession of said tract or tracts of land, and of those claiming any right, title or

interest therein, as far as the same can be ascertained by reasonable diligence.

Section 24. The persons in the occupation of said tract or tracts of land and those having any right, title or interest therein, whether named in the petition or not, shall be defendants thereto, and may appear and be heard before the commissioners herein provided for, and in proceedings subsequent thereto, in the same manner as if they had appeared and answered said petition.

Section 25. The said court, or judge thereof, either in term time or vacation, shall, by order, appoint the time for the hearing of said petition; and such hearing may be had, and all orders in said proceedings may be made by the said court, or the judge thereof, either in term time or vacation.

Section 26. The city attorney shall cause all the owners and occupants of said tract or tracts of land, so far as the same can be ascertained by reasonable diligence, who reside in said city, to be personally notified of the pendency of said petition, at least ten days before the hearing thereof; and if any of said occupants or owners are unknown, or do not reside in said city, and have not been personally notified of the pendency of said petition, said city attorney shall cause a notice, stating the filing of said petition, the object thereof, the tract or tracts of land sought to be appropriated, and the time and place of the hearing of said petition, to be published for three successive weeks previous to the time of hearing of said petition, in some newspaper published in said city.

Section 27. The defendants to said petition may appear and show cause against said petition on or before the time for the hearing thereof, or such other time as the hearing may be continued to; and upon satisfactory proof being made that the defendants have been duly notified of the pendency of said petition, as herein prescribed; and upon the hearing of the allegations and proofs of the said parties, if said court or judge shall be satisfied that the lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition, then such judge or court shall appoint three competent and disinterested persons as commissioners, one of whom shall be selected from among the persons, if any, named for that purpose by said city, and one shall be selected from among the persons, if any, named on the part of any of the defendants, to ascertain and assess the compensation to be paid to the person, or persons having or holding any right, title or interest in or to each of said tracts of land, for and in consideration of the appropriation of such land to the use of said city. If any vacancy occur among said commissioners by reason of any one or more of them refusing or neglecting to act, or by any other means, one or more commissioners may be appointed by said court or judge to fill such vacancy, upon notice being given of such vacancy, as said court or judge may direct.

Section 28. The said court or judge shall appoint the time and place for the first meeting of said commissioners, and the time for the filing of their report, and may give such further time as may be necessary for that purpose if they shall not have completed their duties. The said commissioners, or a majority of them, shall meet at the time and place as ordered, and before entering on their duties shall be duly sworn to honestly, faithfully and impartially perform the duties imposed upon them; and any one of them may issue subpoenas for witnesses for either parties, and may administer oaths; and said commissioners may adjourn from place to place and from time to time, as may be necessary for the proper discharge of their duties.

Section 29. The said commissioners shall proceed to view the several tracts of land as ordered by the said court or judge, and shall hear the allegations and proofs of said parties, and shall ascertain and assess the compensation of the lands sought to be appropriated, to be paid to the person or persons having or holding any right, title or interest in or to each of the several tracts of land. In ascertaining such compensation they shall take the actual value of such land, and the actual value of improvements thereon that may be wholly destroyed or rendered valueless by such appropriation, but the amount of any resulting damages that they may find from the evidence of any such person will have sustained by reason of such appropriation, other than such actual value of said premises, may be offset against the value of any benefit or advantage that in their opinion will accrue to him or them by reason of the opening, widening or extending of any street or streets, lane or alleys; and said commissioners shall, on or before the time or times as ordered by said court or judge, file in said clerk's office their report, signed by them or a majority of them, setting forth their proceedings in the premises; and they may include all of said tracts in one report, or make several reports, including one or more of said tracts of land, if the said court or judge should so order, or if they shall deem it proper.

Section 30. In case there are adverse or conflicting claims to the compensation or damages assessed for any tract of land, or any right, title or interest therein, thus sought to be appropriated, the parties thus ascertaining (asserting) such claim should present the same by petition to the court or judge after the report of the commissioners shall have been filed, and said court or judge shall proceed to determine the same, and in such case said city, instead of paying to any of said parties so contesting, may pay the amount of such compensation to the clerk of said court, to abide the order of the court or judge in said proceedings, and the city shall not be liable for any of the costs caused by the adjudication of such conflicting claims. The said city, or any of said defendants, if dissatisfied with the report, may, within twenty days after the time for the filing of said report, and after ten days' notice to the parties interested, move to set aside the report and to have a new trial as to any tract of land; and upon good cause shown therefor, the said court or judge shall set aside the report as to such tract of land, and may recommit the matter to the same or to other commissioners, who shall be ordered to proceed in like manner as those first appointed, but such matter shall not be more than once recommitted to (the) commissioners.

Section 31. Upon the expiration of twenty days after the filing of said report or reports, or at such further time as may be appointed therefor, if the motion and notice shall not have been made and given as aforesaid, and if the proceedings of said commissioners appear to have been properly and correctly done, the said court or judge shall confirm each of said reports, and certify the same thereon.

Section 32. Each of said reports and the certificates thereon, upon the compensation therein named being paid, shall be recorded in the recorder's office of the said county by said city. The said court or judge may make all such orders as may be necessary or proper in special proceedings provided for in this act, and shall cause the pleadings and proceedings to be amended whenever justice may require it to be done; and shall direct the manner of service of all orders and notices not herein specially provided for. Costs in such special proceedings shall be taxed by the clerk at the rates prescribed in the fee bill for said county in civil actions, and shall

be paid by said city, except in case where a defendant shall move for a new trial; and the compensation assessed by the commissioners shall not be increased more than ten per cent upon the previous assessment, in which case the defendant shall pay the cost.

Section 33. Upon the report of the commissioners being filed for record, as above provided for, and upon the payment or tender of the compensation and costs, as provided for in this act, the real estate, or the right, title or interest therein, described in such report, shall be and become the property of said city, to be used as a public street or streets and appropriated to public use.

3. Marysville.

(Stats. 1876, p. 149.)

Section 1. The territory described in section two of this act, and the inhabitants therein residing, are hereby declared to be a municipal corporation, with the powers and under the provisions of title three of the Political Code of this state, to be known in law as the "City of Marysville."

Political Code, section 4408. The common council has power:

19. To levy and collect taxes, to lay out, extend, alter, or widen streets and alleys, and make appropriations for any object of city expenditures.

Political Code, section 4409. Whenever the owners of a major part of the property fronting on any street or avenue desire to improve such street by paving the same, or constructing sewers, or otherwise, the mayor and council may make such improvement at the expense of all the owners of property on the street, which expense must be in proportion to the number of feet owned by each.

4. Nevada City.

(Stats. 1877–78, p. 221.)

Section 8. The board of trustees shall have power . . . .

Fourth—To lay out, extend, and alter streets and alleys, provide for the grading, draining, cleaning, repairing, widening, lighting, or otherwise improving the same, and for the construction, repair, regulation, and preservation of sidewalks, bridges, drains, curves, gutters, and sewers, and to prevent or remove obstructions thereto and to any part thereof.

Section 19. In the public streets already laid out by lawful authority, opened and graded within the limits of said city, or which shall hereafter be laid out, opened, and graded, as provided in this act, the paving, planking, draining, and repairs of every kind, shall be assessed upon and done at the equal expense of the adjacent lots on each side of said streets, each separate owner being at liberty, and being required, under the direction of the street committee, to do, or cause to be done, at his own expense, the work and repairs, and improvements in front of his own premises, to the center of the street.

Section 20. When any street is located, but not graded, paved, or planked, the board of trustees, when they shall deem it expedient, may order the whole or any portion thereof to be graded, after notice of their intention, published in some daily newspaper printed in said city, for the period of ten days, unless the owners of over one-half in extent of frontage of lands and lots bounded on such streets or portion of a street, so proposed to be graded shall have made written objection thereto, and delivered the same to the clerk of the board of trustees, within said period of ten days.

Section 21. If the owners of more than one-half of frontage of lands and lots fronting on any street or portion of a street not yet graded, paved, or planked, or their duly authorized agent, shall petition the board of trustees, in writing, to grade, pave, or plank the same, the said board of trustees shall order the same to be done, but in such case the board may receive and consider remonstrances, for the purpose only of ascertaining whether the petitioners truly comprehend more than one-half of said owners, as in this section required, no order or permission shall be given to grade, pave, or plank [any] street or portion of a street, without extending and completing such grading, paving, or planking throughout the whole breadth of such street, up to the boundary of the sidewalks thereof.

Section 22. The total amount of the expense of grading, planking, or paving any street, or portion of a street, under the provisions of this act, shall be assessed upon and borne with absolute equality by all lands fronting thereon; the expense to be calculated upon and borne by each block separately and in proportion to the frontage, at a rate per front foot sufficient to cover such total expense of the work on each block; provided, that all street crossings, and the squares formed by the junction of two or more streets, shall be paved, graded, or planked and kept in repair at the expense of the city, and the contract therefor, and all contracts for work authorized to be done upon streets and crossings shall in all cases be given to the lowest bidder giving adequate security, and shall be given without security to the owners of lands and lots, or the greater part thereof in extent of frontage which are liable to be assessed therefor; provided, they offer to take the same at as low a rate as any others offering adequate security; and if the owner or owners of any lot or part of a lot shall have filled in, in whole or in part, the street opposite thereto, at his own or their own expense, such owner or owners shall be entitled to an allowance therefor, upon his or their assessment, at the same rate per cubic yard, or square foot, as shall be paid for filling such street, whenever, for that purpose, an assessment shall be made.

Section 23. Before giving out any such contracts the board of trustees shall cause notice to be inserted in one of the daily newspapers published in said city, for a period of ten days, inviting sealed proposals for the work contemplated, to be handed in to the city clerk of the board of trustees; said trustees shall open and examine and publicly declare them in open session, and thereupon the contract shall be awarded at the lowest price offered, according to the provisions of the next preceding section; provided, that the lot owners, or the major part, as specified in said section, liable to be assessed therefor shall not be required to present sealed proposals, but may, within five days of such award, elect to take the contract for the price it was awarded at. The president of the board of trustees shall be authorized, in his official character, to enter into written contracts for work upon streets and street crossings ordered to be done, and awarded, or taken by the owners, according to the provisions of this article.

Section 24. When required by the board of trustees, the marshal shall make a list which shall state the value or assessment per foot, as the case may require, for each separate parcel of land liable for improvements made or about to be made, which shall be presented to the board of trustees. The tax collector shall cause a copy of said roll to be published in some newspaper designated by the president of the board of trustees for a period of five days. He shall, immediately after said publication is made, proceed to collect the assessment tax for twenty days after the five days' publica-

tion have expired. After the expiration of the twenty days he shall immediately make out a list of all delinquents, which shall be handed by him to the board of trustees. After the delivery by the collector to the board of trustees, the delinquent list, as aforesaid, the board may instruct the collector to proceed to the collection thereof, and for that purpose the collector shall have all the powers and authority in the premises as is possessed by the collectors of state and county taxes under the general revenue laws; and in the collection of said delinquent taxes or assessments, the collector shall proceed according to and be governed by the general revenue laws prescribing the duties of collectors of state and county taxes.

Section 25. All taxes or assessments levied or assessed on any property for the purpose of grading, paving, planking, repairing, or improving any streets, crossings, or sidewalks shall become a lien against said property, the same as other taxes or assessments for state and county purposes, said lien to take effect on the day the assessment is levied by said board of trustees.

Section 26. The grading, draining, planking, paving, repairing, or otherwise constructing or improving of streets and sidewalks and street crossings, must in all cases be done under the direction and to the satisfaction of the street committee, and all contracts made therefor must contain this condition, and also express notice, that in no case (except when it is otherwise provided in this act) will the said city be liable for any portion of the expense, nor for any delinquency of persons or property assessed.

Section 27. The street committee, or marshal, by their direction, shall require, by verbal or written notice (to be delivered to them personally or left on the premises), all owners, tenants, and occupants of lots and buildings situated and fronting upon streets already graded, paved, or planked, or which shall hereafter have been graded, paved, or planked, when local repairs are needed in the planking, grading, paving, sidewalks, sewers, or otherwise, to make such repairs forthwith, each one in front of the property of which he is the owner, tenant, or occupant, and all repairs so made, or expense therefor incurred by tenants, may be charged to the landlord, unless otherwise agreed between such landlord and tenant, and deducted from the rents payable under their leases; and the said tenant shall have a lien upon the premises therefor, and may retain possession thereof till the amount so advanced shall be repaid, with interest, from accruing rent or otherwise.

5. Santa Clara.

(Stats. 1871–72, p. 251.)

Section 13. The board of trustees are hereby authorized and empowered to order the whole or any portion of any street or streets, lane or lanes, alleys, courts, or squares, graded or regraded to the official grade, paved, graveled, or macadamized, and have the same repaired; to order sidewalks, culverts, sewers, drains, and curbing constructed and repaired; to improve and beautify the public squares, and to order any other work to be done which shall be necessary to make and complete the whole or any portion of said streets, sidewalks, lanes, alleys, and squares, as, in their opinion, the public good and convenience requires.

Section 14. The board of trustees may order any of the work herein authorized to be done after a notice of their intention so to do, in the form of a notice of intention, describing the proposed work, signed by the town clerk, after being published for two consecutive weeks. At the ex-

piration of the time as given in any such notice of intention, said board of trustees shall be deemed to have acquired jurisdiction to order any of the work herein provided for to be done; and all owners of lands or lots, or portions of lots, who may feel aggrieved, or who may have objected to any of the subsequent proceedings of the board of trustees in relation to the work proposed and described in the notice of intention, shall file with the town clerk a remonstrance, wherein they shall state in what respect they feel aggrieved, and their reasons for objecting to the proceedings; said remonstrance shall be considered by the board of trustees, and their decision thereon shall be final and conclusive; provided, that if more than one-half of the owners or occupants, or the owners or occupants of more than one-half of the real estate fronting on any street, lane, alley, or square, on which as a whole said work or improvements to be done, shall remonstrate against said work or improvements, said board of trustees shall then suspend further proceedings for the term of six months, unless such owners or occupants aforesaid shall sooner petition the board of trustees to have such improvements made; and it being further provided, that if at any time of hearing of such remonstrance against said work or improvements, or at any time subsequent thereto, it shall come to the knowledge of the board of trustees that said improvements, or any portion of them, are an immediate public necessity, they shall then proceed in reference to said proposed work or improvements, or so much thereof as they may deem and declare to be necessary, as if no remonstrance had been made.

Section 15. It shall be the duty of the board of trustees to cause an immediate survey of any proposed work or improvements to be made by the town, or some competent surveyor, who shall, on the conclusion of said survey, produce a map or diagram indicating the proposed grade, and the amount of excavation or filling in front of each person's real estate to the middle of the street; all lots on the corners of blocks to include the cross-streets, or if improvements only extend to the sidewalks, then he shall indicate as aforesaid the amount of excavation, of filling of the sidewalks in front of each person's real estate. If the board of trustees approve the survey, diagram, and specifications of the surveyor, the same shall be placed on file in the office of the town clerk, and they shall order said improvements to be made, and shall cause such order to be published at least three consecutive weeks, in such manner as they may direct. At the expiration of such notice the board of trustees may determine by ordinance or resolution at what time said work or improvements shall be commenced, and within what time all of which shall be completed, and also may in their discretion extend the time so fixed; and such of the persons having frontage on the line of the proposed work or improvements, shall have the privilege of doing the same in accordance with the requirements of the order, survey, diagram, and specifications of the surveyor, on file in the office of the clerk as aforesaid; but if the owner or occupant of any such real estate fail or neglect so to do within the time fixed for doing the same, or within any extension of time which may have in the discretion of the board of trustees been granted, it shall be the duty of the town marshal to let out in a manner described by the resolution or ordinance of the board of trustees, the doing of all the work, or the making of all the improvements remaining unfinished; and when the doing of all such work, or the making of all such improvements shall have been finished and accepted by the surveyor and town marshal, they shall certify the same to the board of trustees, who shall order the town clerk, as ex officio town assessor, to make an assessment of the cost thereof, as apportioned to each

of the persons or occupants owning or occupying said real estate, which said assessment shall constitute a lien upon such real estate, dating from the time such work or improvement was ordered, and after due notice, present the same to the board of trustees, who shall on a specified day sit as a board of equalization thereon, and determine in reference thereto in manner as is required for the equalization of other town tax; and all persons feeling aggrieved in reference to any such assessment, shall at such time, either in writing or otherwise, specifically make known the cause of their objections and complaint, which shall be heard and passed upon by said board of equalization, and their determination therein shall be final and conclusive; and when thus equalized and approved by them, said list shall be properly certified by the town clerk and placed in the hands of the town marshal for collection, and all subsequent proceedings in relation thereto shall be the same as prescribed herein for the collection of other town taxes, as far as the same may be applicable.

Section 16. The cost of the survey, specifications, maps, or diagram of any of the work or improvements hereinbefore mentioned, together with all culverts and street crossings, shall be paid by the town.

Section 17. When any street, or portions of any street, or the sidewalk, or any portion thereof, becomes in a condition to be dangerous, or in a condition to cause great public inconvenience, the town marshal shall, by notice in writing, to be delivered to them personally, or posted on the premises of the owners, occupants, or tenants upon any real estate in front of which such repairs or improvements are required to be made, require them to make such improvements or repairs forthwith, particularly specifying in such notice what improvements or repairs are required to be made. If such improvements or repairs are not commenced within three days after notice given as aforesaid, and diligently prosecuted to completion without unnecessary delay, the town marshal shall be deemed to have acquired jurisdiction to contract for the doing of the work or improvements required by said notice, and may enter into a contract with any competent person, to make the required improvements or repairs, at the expense of the owners of such real estate, at such price as he may deem reasonable and just, and such owners shall be liable to pay the same; and such sum or sums of money contracted to be paid for said work or improvements, shall be a lien upon the real estate in front of which, to the middle of the street, said work or improvements shall have been made, and may be collected by civil action from the personal effects of such owner or owners, or a tax levied or assessed and equalized, as provided in section fifteen of this act; and all money collected by the town marshal for the construction, improvements, or repairs of any street, lane, alley, or sidewalk, if collected by an assessment duly equalized and certified, shall be paid to the town treasurer as a special fund to the credit of the particular object for which it was assessed; or if collected by voluntary payment, or by civil action, from the personal effects of the owner of such real estate, he shall pay the same over to the contractor, taking his receipt therefor, a duplicate of which he shall file with the town clerk; and for all assessments made upon real estate for the construction, improvement, or repairs of any street, lane, alley, or sidewalk, such an amount shall be added to each and every of such assessments, in addition to the contract price thereof, as will be sufficient to pay the fees of the collector and treasurer, as allowed by law.

Section 18. The town, or the proper authorities thereof, shall not be held responsible for nor assume the payment of any money for work done

or repairs and improvements made, until after all demands on the owners or occupants of such real estate have been paid or prosecuted to final collection; and in case of failure on the part of the town to collect such tax from the owner or occupant, or from the real estate, the person or persons having contracted for, done, and completed any part of the whole of such work done, or repairs and improvements made, may present the same to the board of trustees and be allowed and paid therefor from the general fund of said town.

Section 32. The board of trustees of the town of Santa Clara shall, whenever a petition signed by twenty-five citizens of said town shall be filed with the town clerk, praying for the opening of any new street or streets, or the extending, widening, altering, or vacating of any street or streets, lanes, or alleys in said town, if deemed by said board a public necessity, direct, by ordinance, some competent surveyor to make an accurate survey of any such proposed street, lane, or alley, and return the same to the board of trustees at its next regular meeting, or within such time as the board of trustees shall by ordinance or resolution direct. Such survey shall be accompanied with a report and diagram map, showing the location of such proposed street, lane, or alley, and the width thereof; also, the boundaries of the lands of each owner through which such street, lane, or alley is proposed to be located, widened, extended, altered, or vacated. And for the purpose of making such survey, the surveyor shall have the right to enter upon any and all such lands.

Section 33. At the next regular meeting of the board of trustees after filing of said survey, said board shall, by order, appoint a time for the hearing of said petition, and for the assessment and adjustment of any and all damages that may be caused by reason of the opening, widening, extending, or vacating of such proposed street, lane, or alley; which time shall not be less than thirty nor more than sixty days from the time of making such order. Upon the making of said order, the town clerk shall issue notice, directed to each and every person whose lands, or any part thereof, will be affected by said new street, lane, or alley, or the widening or extending thereof, setting forth that such petition has been filed, and that the survey of such proposed street has been filed, and the time and place when and where said petition and all applications for damages and objections to the opening of said proposed street will be heard by the board of trustees. Said notice shall be served by the town marshal, by posting copies of the same in some conspicuous place on the premises belonging to each owner who can be found by reasonable diligence in said town; which said notice shall be so posted and served at least ten days next before the time set for hearing.

Section 34. At the meeting of the board of trustees provided for in the order and notice required in the last section, or at such other meeting as the hearing may be adjourned to, the board of trustees shall proceed to consider all matters touching the petition for the opening of such street, lane, or alley, or the widening or extending or vacating of the same, and all subsequent proceedings had therein in connection with the survey, report, and diagram of the surveyor on file, and such evidence as the parties interested may produce touching the same; and if in the opinion of the board the public good and convenience require the opening, widening, extending, or vacating of such street, lane, or alley, the same shall be so declared by ordinance, and the survey and report of the surveyor shall be confirmed, in whole or in part, as the board shall direct; and thereafter,

and on payment of the damages hereinafter provided, such street, lane, or alley shall be and remain a public street, lane, or alley. Any person or persons owning or claiming lands through or upon which such street, lane, or alley is proposed to be opened, widened, extended, or vacated, and desiring to apply for damages in consequence thereof, shall make application at the meeting at which said petition is finally considered, pursuant to said notice by petition in writing to said board, wherein they shall set forth the amount and character of the land and improvements affected thereby and any other circumstances having relation to the subject of damages; provided, that the legal guardians of minors, idiots, and insane persons shall be authorized and required to take all measures in the premises which may be necessary to fully protect their rights. The board of trustees at such regular meeting, or at the time that the further hearing may be adjourned to, shall ascertain and determine the amount of damages maintained by each and every person owning or claiming said lands; and in so doing, the benefits accruing from the opening, widening, or extending or vacating of such street, lane, or alley to the person to whom damages may be allowed shall be taken into consideration, and shall be an offset against any such damages.

Section 35. The damages that may be allowed by the board of trustees to such owners and claimants shall be audited, allowed, and paid as other claims against said town are audited, allowed, and paid; and upon the issuing or tendering of the proper amount therefor, the town marshal shall, upon the order of the board of trustees, proceed and open said street, lane, or alley without unnecessary delay; provided, that no sum shall be audited nor any warrant drawn therefor unless there shall at the time be sufficient funds in the town treasury legally applicable to the payment of the same; and in such case, if the board of trustees shall deem proper or necessary, they may order a special election, as provided for in section twelve, and proceed and collect by special tax, if authorized by the vote at such election, a sufficient amount to pay such damages; and after the same shall have been so collected, said awards for damages may be audited and paid as in other cases.

Section 36. If the person or persons claiming damages on account of the opening, widening, extending, or vacating of any such street, lane, or alley, shall be dissatisfied with the award of the board of trustees, and shall refuse to receive the amount so awarded, such person or persons shall, within ten days from the final hearing and order, commence an action against the town of Santa Clara in a court of competent jurisdiction for such damages, and all the proceedings therein shall be conducted in the same manner as like actions are required to be conducted under or by virtue of the provisions of an act entitled an act concerning roads and highways in the county of Santa Clara, approved March thirty-first, eighteen hundred and sixty-six; and the provisions of said act in reference to said actions, where they are not inconsistent with the provisions of this act, are hereby made applicable thereto.

IV. TEXT OF GENERAL TAXATION STATUTES.

1. Municipal Improvement Act of 1901, p. 1199.
2. Sewer District Act of February 13, 1911, p. 1203.
3. Sewer District Act of April 14, 1911, p. 1208.
4. Sewer District Act of 1909, p. 1213.

1. Municipal Improvement Act of 1901.

An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof.

[Became a law under constitutional provision without governor's approval, February 25, 1901. Stats. 1901, p. 27.]

Amended 1907, pp. 570, 609, 634; 1909, p. 720.

"This act was not repealed by 'Local Improvement Act' 1901, p. 34 (Town of Mill Valley v. House, 142 Cal. 698). The provisions of the San Francisco charter for a bonded indebtedness for municipal improvements, including schoolhouses, prevail on that subject over the provisions of this act, so far as there may be any conflict between them (Law v. San Francisco, 144 Cal. 384). See, also, 1889, p. 361, and Oakland v. Thompson, 34 Cal. Dec. 91."—Code Commissioners' Note.

§ 1. Any city, town or municipal corporation incorporated under the laws of this state, may as hereinafter provided incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

§ 2. Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, waterworks, water rights, sewers, light or power works or plants, buildings for municipal uses, wharves, schoolhouses, fire apparatus, and street work, or other works, property or structures necessary or convenient to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting of such board, by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said city, town or municipal corporation the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted; provided, that propositions of incurring indebtedness for more than one object or purpose may be submitted at the same election. The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such special election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in such ordinance, such election shall be held as provided by law for holding municipal elections in such municipality; provided, however, that if the rate of interest to be paid on such indebtedness shall not exceed four and one-half per centum per annum, payable semi-annually,

the rate of interest need not be recited in such ordinance, but in its discretion, the said legislative branch may recite in such ordinance a maximum rate of interest to be paid on such indebtedness, not exceeding six per centum per annum payable semi-annually, which rate when so recited, shall not be exceeded in the issuance of bonds for such indebtedness. [Amendment approved March 19, 1907. Stats. 1907, p. 609. In effect immediately.]

§ 3. Such ordinance shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. In municipalities where no such newspaper is published, such ordinance shall be posted in three public places therein for two succeeding weeks. No other notice of such election need be given. It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided; provided, however, should the proposition so submitted at such election fail to receive the requisite number of votes of the qualified voters, voting at such election to incur the indebtedness for the purpose specified, the legislative branch of such municipality shall have no power or authority within one year after such election to call or order another election for incurring any indebtedness for improvements, substantially the same as voted upon at such prior election, unless a petition, signed by a majority of the taxpayers on the latest assessment-roll of such municipality, be filed with such municipality, requesting that such proposition or a proposition substantially the same be submitted at an election to be called for the submission of such proposition and to be held in accordance with the provisions of this act.

§ 4. No city, town or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed fifteen per cent of the assessed value of all the real and personal property of such city, town or municipal corporation.

§ 5. All municipal bonds issued under the provisions of this act shall be payable substantially in the following manner: A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, and at a place within the United States, to be fixed by the legislative branch of the municipality issuing the bonds and designated in such bonds, together with the interest on all sums unpaid at such date; provided, however, that, in case of bonds issued for the acquisition, construction or completion of waterworks or light or power works or plants, or any other authorized revenue-producing public works, plant, utility or property, the legislative body of the municipality may, in its discretion determine and fix a date for the earliest maturity of the principal of such bonds not more than ten years from the date of the issue of such bonds, but, in this event, the whole amount of such indebtedness must be made payable in equal annual parts in not to exceed forty years from the time of contracting the same. The bonds shall be issued in such denominations as the legislative branch of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars, and shall be payable on the day and at the place fixed in such bonds, and with interest at the rate specified in the bonds, which rate shall not be in excess of six per cent per annum, and shall be payable semi-annually, and said bonds shall

be signed by the executive of the municipality, or by such other officer thereof, as the council, board of trustees, or other legislative body of the municipality shall, by resolution adopted by a two-thirds vote of all its members, authorize and designate for that purpose; and also signed by the treasurer thereof, and shall be countersigned by the clerk. The coupons of said bonds shall be numbered consecutively and signed by the treasurer.

In case of any of such officers whose signatures or countersignatures appear on the bonds or coupons shall cease to be such officer before the delivery of such bonds to the purchaser, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes the same as if they had remained in office until the delivery of the bonds. [Amendment approved March 25, 1909. Stats. 1909, p. 720. In effect immediately.]

Also amended in 1907, Stats. 1907, p. 610.

§ 6. Such bonds may be issued and sold by the legislative branch of the city, town or municipal corporation as they may determine, but for not less than their par value, and the proceeds of such bonds shall be placed in the municipal treasury to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance.

§ 7. The legislative branch of said city, town or municipality shall at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually each year until said bonds are paid, or until there shall be a sum in the treasury of said city, town or municipality set apart for that purpose to meet all sums coming due for principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds, and also such part of the principal thereof as shall become due before the time for fixing the next general tax levy. Provided, however, that if the maturity of the indebtedness created by the issue of bonds be made to begin more than one year after the date of the issuance of such bonds, such tax shall be levied and collected at the time and in the manner aforesaid annually each year, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof on or before maturity. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes, and shall be collected at the time and in the same manner as other municipal taxes are collected, and be used for no other purpose than the payment of said bonds and accruing interest. [Amendment approved March 19, 1907. Stats. 1907, p. 611. In effect immediately.]

§ 8. It shall be the duty of the legislative branch of every city, town or municipal corporation, wherein public improvements are being made under the provisions of this act, to make all needful rules and regulations for carrying out and maintaining such improvements, to appoint all needful agents, superintendents and engineers to properly look after the construction and operation of such public works, and in all lawful ways to protect and preserve the rights and interests of the municipality; provided, however, that in cities, towns, or municipalities operating under a charter heretofore or hereafter framed under section 8 of article 11 of the constitution, and having a board of public works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality.

§ 9. All contracts for the construction or completion of any public work or improvement or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder. The legislative branch of the municipality shall advertise for at least ten days in one or more newspapers published in the municipality, inviting sealed proposals for furnishing the labor and materials for the proposed work or improvement before any contract shall be made therefor. The said legislative branch shall have the right to require such bonds as they may deem best from the successful bidder to insure the faithful performance of the contract work, and shall also have the right to reject any and all bids; provided, however, that nothing herein contained shall be construed as prohibiting the municipality itself from constructing or completing such works or improvements, and employing the labor necessary therefor; and provided further, that, in cities, towns or municipalities operating under a charter, heretofore or hereafter framed under section 8 of article 11 of the constitution and providing for a board of public works all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality, and, in case such charter also prescribes the manner of letting and entering into contracts for the furnishing of labor, materials or supplies for the constructing or completion of public works or improvements, the contracts therefor shall be let and entered into in conformity with such charter. [Amendment approved March 19, 1907. Stats. 1907, p. 611. In effect immediately.]

§ 9½. Whenever the legislative branch of any municipality shall by resolution deem the expenditure of money raised by the sale of bonds under the terms of this act for the purpose for which said bonds were voted impracticable or unwise, said legislative branch of said city, town, or municipal corporation may call a special election to obtain the consent of the people of said city, town, or municipal corporation to use said money for some other specified municipal purpose. The ordinance calling such special election shall recite the new object or purpose for which the said money is proposed to be expended, and shall fix the date on which such special election will be held, the manner of holding such election and the voting for or against the expenditure of said money for said purpose, and in all particulars not recited in said ordinance such election shall be held as provided by law for holding of such municipal elections in such municipality. Such ordinance shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. In municipalities where no such newspaper is published, such ordinance shall be posted in three public places therein for two succeeding weeks. No other notice of such election need be given. It shall require the votes of two-thirds of all the voters at such special election to authorize the expenditure of the money for the purpose mentioned in the ordinance calling said special election. [New section approved March 19, 1907. Stats. 1907, p. 634. In effect immediately.]

§ 10. Whenever the legislative branch of any municipality shall by resolution deem it necessary, they may require the treasurer of such municipality to give additional bonds for the safe custody and care of the public funds.

be signed by the executive of the municipality, or by such other officer thereof, as the council, board of trustees, or other legislative body of the municipality shall, by resolution adopted by a two-thirds vote of all its members, authorize and designate for that purpose; and also signed by the treasurer thereof, and shall be countersigned by the clerk. The coupons of said bonds shall be numbered consecutively and signed by the treasurer.

In case of any of such officers whose signatures or countersignatures appear on the bonds or coupons shall cease to be such officer before the delivery of such bonds to the purchaser, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes the same as if they had remained in office until the delivery of the bonds. [Amendment approved March 25, 1909. Stats. 1909, p. 720. In effect immediately.]

Also amended in 1907, Stats. 1907, p. 610.

§ 6. Such bonds may be issued and sold by the legislative branch of the city, town or municipal corporation as they may determine, but for not less than their par value, and the proceeds of such bonds shall be placed in the municipal treasury to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance.

§ 7. The legislative branch of said city, town or municipality shall at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually each year until said bonds are paid, or until there shall be a sum in the treasury of said city, town or municipality set apart for that purpose to meet all sums coming due for principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds, and also such part of the principal thereof as shall become due before the time for fixing the next general tax levy. Provided, however, that if the maturity of the indebtedness created by the issue of bonds be made to begin more than one year after the date of the issuance of such bonds, such tax shall be levied and collected at the time and in the manner aforesaid annually each year, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof on or before maturity. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes, and shall be collected at the time and in the same manner as other municipal taxes are collected, and be used for no other purpose than the payment of said bonds and accruing interest. [Amendment approved March 19, 1907. Stats. 1907, p. 611. In effect immediately.]

§ 8. It shall be the duty of the legislative branch of every city, town or municipal corporation, wherein public improvements are being made under the provisions of this act, to make all needful rules and regulations for carrying out and maintaining such improvements, to appoint all needful agents, superintendents and engineers to properly look after the construction and operation of such public works, and in all lawful ways to protect and preserve the rights and interests of the municipality; provided, however, that in cities, towns, or municipalities operating under a charter heretofore or hereafter framed under section 8 of article 11 of the constitution, and having a board of public works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality.

§ 9. All contracts for the construction or completion of any public work or improvement or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder. The legislative branch of the municipality shall advertise for at least ten days in one or more newspapers published in the municipality, inviting sealed proposals for furnishing the labor and materials for the proposed work or improvement before any contract shall be made therefor. The said legislative branch shall have the right to require such bonds as they may deem best from the successful bidder to insure the faithful performance of the contract work, and shall also have the right to reject any and all bids; provided, however, that nothing herein contained shall be construed as prohibiting the municipality itself from constructing or completing such works or improvements, and employing the labor necessary therefor; and provided further, that, in cities, towns or municipalities operating under a charter, heretofore or hereafter framed under section 8 of article 11 of the constitution and providing for a board of public works all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality, and, in case such charter also prescribes the manner of letting and entering into contracts for the furnishing of labor, materials or supplies for the constructing or completion of public works or improvements, the contracts therefor shall be let and entered into in conformity with such charter. [Amendment approved March 19, 1907. Stats. 1907, p. 611. In effect immediately.]

§ 9½. Whenever the legislative branch of any municipality shall by resolution deem the expenditure of money raised by the sale of bonds under the terms of this act for the purpose for which said bonds were voted impracticable or unwise, said legislative branch of said city, town, or municipal corporation may call a special election to obtain the consent of the people of said city, town, or municipal corporation to use said money for some other specified municipal purpose. The ordinance calling such special election shall recite the new object or purpose for which the said money is proposed to be expended, and shall fix the date on which such special election will be held, the manner of holding such election and the voting for or against the expenditure of said money for said purpose, and in all particulars not recited in said ordinance such election shall be held as provided by law for holding of such municipal elections in such municipality. Such ordinance shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. In municipalities where no such newspaper is published, such ordinance shall be posted in three public places therein for two succeeding weeks. No other notice of such election need be given. It shall require the votes of two-thirds of all the voters at such special election to authorize the expenditure of the money for the purpose mentioned in the ordinance calling said special election. [New section approved March 19, 1907. Stats. 1907, p. 634. In effect immediately.]

§ 10. Whenever the legislative branch of any municipality shall by resolution deem it necessary, they may require the treasurer of such municipality to give additional bonds for the safe custody and care of the public funds.

§ 11. All acts and parts of acts in conflict with this act are hereby repealed

§ 12. This act shall not be deemed to repeal, conflict with or modify any provision of any statute of this state concerning the levy of special taxes for specific public improvements when bond issues are not contemplated.

§ 12½. All proceedings which may have been prior to the passage of this act, taken by any city, town or municipal corporation, incorporated under the laws of this state, in the manner prescribed by the said act of which this act is amendatory, for the incurring of indebtedness for the purpose of acquiring, constructing, completing or repairing any wharf or wharves, shall be and the same are hereby declared to be valid as fully as though the incurring of indebtedness for such purpose had been expressly authorized by said act, and any and all indebtedness incurred, or which may hereafter be incurred by any such city, town or municipal corporation, or any bonds which may have been or may hereafter be issued pursuant to any such proceedings so taken or had shall be and the same are hereby declared to be valid, as fully as though the creation of said indebtedness or the issuance of said bonds had been expressly authorized by said act. [New section added March 18, 1907. Stats. 1907, p. 570. In effect immediately.]

§ 13. This act shall take effect immediately.

The amendatory act of March 19, 1907, Stats. 1907, p. 609, contained the following section: "§ 5. That nothing in this act contained shall be construed as affecting the issue or sale of bonds in pursuance of proceedings begun prior to the taking effect of this act and under the provisions of the act amended hereby."

2. Sewer District Act of February 13, 1911.

An act to authorize the legislative body of a municipality to create sewer districts within its boundaries, provide a system of sewer bonds for the construction of sewers therein, and to provide for the payment of said bonds.

[Approved February 13, 1911.]

Section 1. The legislative body of any city, town or municipal corporation, incorporated under the laws of this state may create from time to time, as hereinafter provided, within such city, town or municipal corporation, separate sewer districts whenever in the judgment of such legislative body it may be necessary or convenient for the proper sanitation and drainage of such districts to construct any sewer or sewers therein, and may designate such districts by distinctive names and numbers and may as hereinafter provided, provide for the incurring of indebtedness to pay for the cost of the construction of sewers in such districts.

Section 2. Whenever the legislative body of any such city, town or municipal corporation, shall, by resolution passed by a vote of two-thirds of all its members and approved by the executive of such municipality, determine that the public interest or convenience requires the construction of a sewer or any sewers in any part of the territory of such municipality, said legislative body shall describe in said resolution a district, naming and numbering the same as hereinabove provided, and declare said district to be the district benefited by said work or improvement, and may, at any subsequent meeting, by ordinance passed by a vote of two-thirds of all of its members, and also approved by the said executive, adopt plans and

specifications for the proposed sewer work and also describe the territorial district upon which the expense of such proposed sewer work or improvement shall be chargeable, as hereinafter provided, and shall provide therein for a special election to be held in such sewer district. At such election there shall be submitted to the qualified electors of such city, town or municipal corporation, residing within such sewer district, the proposition of incurring indebtedness for the purposes set forth in said resolution, and no question other than the incurring of the indebtedness for such purposes shall be submitted at such special election. The ordinance calling such special election shall also recite the objects and purposes for which the proposed indebtedness is to be incurred, the estimated cost of the proposed sewer work, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such special election shall be held, the manner of holding such election, and the manner of voting for or against the incurring of such indebtedness. In all particulars not recited in such ordinance, such election shall be held as is provided by law for holding general municipal elections in such city, town or municipal corporation. The maximum rate of interest to be paid on such indebtedness shall be six (6%) per cent per annum, payable semi-annually.

Section 3. Said ordinance shall be published once a day for five days, prior to the date set for such election in some newspaper of general circulation designated by the legislative body of said city, town or municipal corporation, which newspaper is published once a day for at least six days a week in such municipality, or said ordinance shall be published once a week for two weeks prior to the date set for such election, in some newspaper of general circulation designated by said legislative body, and published less than six days a week in such municipality, and one insertion thereof in such last described newspaper each week for two succeeding weeks prior to the date set for such election by the legislative body of said city, town or municipal corporation, shall be a sufficient publication in such newspaper published less than six days a week.

In municipalities where no such newspaper is published, such ordinance shall be posted in three public places in the said sewer district for two succeeding weeks prior to the date set for such election by the legislative body of said city, town or municipal corporation. No other notice of such election need be given. It shall require the affirmative votes of two-thirds of all the aforesaid qualified electors of said sewer district voting at such special election, to authorize the incurring of said indebtedness and the issuance of bonds therefor as provided herein; provided, however, if the proposition so submitted at such election fail to receive the requisite number of votes of the aforesaid qualified electors of such sewer district, voting at such election to incur the indebtedness for the purpose specified, the legislative branch of such municipality shall have no power or authority within six months after such election, to pass any ordinance calling another election for incurring any indebtedness for sewer work within any sewer district which has within its boundaries any of the territory of the district in which, at said election, the requisite number of votes for the issuance of said bonds has not been cast therefor.

Section 4. All bonds issued under the provisions of this act shall be issued in the name of the city, town or municipal corporation in which such sewer district has been formed, and shall be payable in the following manner: a part to be determined by the legislative body of the municipality,

which part shall not be less than the one-fortieth part of the whole amount of such indebtedness, shall be payable each and every year on a day and date, and at a place within the United States, to be fixed by the legislative body of the city, town or municipal corporation issuing the said bonds, and designated in such bonds, together with the interest on all sums unpaid at such date, until the whole of said indebtedness shall have been paid.

The bonds shall be issued in such denominations as the legislative body of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars, and shall be payable on the day, and at the place, fixed in such bonds, and with interest at the rate specified in such bonds, which rate shall not be in excess of six per cent per annum, and shall be payable semi-annually, and said bonds shall be signed by any officer of said city, town or municipal corporation designated for that purpose by the city council, board of trustees or other legislative body of such city, town or municipal corporation, by resolution adopted by two-thirds vote of all of its members, and shall also be signed by the treasurer thereof, and shall be countersigned by the clerk of such city, town or municipal corporation. The coupons of said bonds shall be numbered consecutively and signed by the treasurer.

In case any of such officers whose signatures appear on the bonds or coupons shall cease to be such officer before the delivery of such bonds to the purchaser, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes, the same as if such officers had remained in office until the delivery of the bonds.

Section 5. The legislative body of the city, town or municipal corporation within whose territory such sewer district has been created as herein provided, may issue and sell said bonds at not less than their par value, and the proceeds of the sales of such bonds shall be placed in the municipal treasury to the credit of the proper sewer district fund and shall be applied exclusively to the purposes and objects mentioned in the said ordinance.

Section 6. Before the legislative body of such city, town or municipal corporation shall award the contract for doing any sewer work or improvement, the expense of which is to be paid out of the proceeds of sales of the bonds issued in accordance with the provisions of this act, said legislative body of said city, town or municipal corporation, shall cause notice with specifications to be posted conspicuously for five days on or near the chamber door of said legislative body, inviting sealed proposals or bids for doing said sewer work or improvement, and shall also cause notice of said work inviting said proposals and referring to the specifications posted or on file, to be published for two consecutive insertions in a daily, semi-weekly, or weekly newspaper, published and circulated in said city, town or municipal corporation, designated by said legislative body for that purpose, and in case there is no newspaper published in said city, town or municipal corporation, then it shall only be posted as hereinbefore provided. All proposals or bids offered shall be accompanied by a check, payable to the order of the executive officer of said city, town or municipal corporation, certified by a responsible bank for an amount which shall be not less than ten (10%) per cent of the aggregate of the proposal, or by a bond for the said amount, and so payable, signed by the bidder and by two sureties who shall justify before an officer competent to administer an oath, in double such amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of said legislative body and said legislative body shall in open session examine and publicly declare the

act or under the provisions of any other act relative thereto. But any provision contained in any other acts in conflict with provisions hereof shall be void as to, and of no effect upon, proceedings commenced under the provisions of this act, except as herein provided.

Section 11. The word "sewer" as used in this act shall be deemed to, and is hereby declared to, include sewers for sanitary or drainage purposes, rains or conduits for surface or storm waters, and the outlets therefor.

Section 12. This act shall take effect immediately.

3. Sewer District Act of April 14, 1911.

An act to provide for the division of municipalities into sewer districts, and for the construction of, or acquisition and maintenance of sewers therein, providing a system of district sewer bonds to pay the cost of such construction of, or acquisition and also for the payment of such bonds.

[Approved April 14, 1911.]

Section 1. The legislative body of any city, town or municipal corporation, incorporated under the laws of this state may create from time to time, as hereinafter provided, within such city, town or municipal corporation, separate sewer districts whenever in the judgment of such legislative body it may be necessary or convenient for the proper sanitation and drainage of such districts to construct or acquire any sewer or sewers therein, and may designate such districts by distinctive names and numbers and may as hereinafter provided, provide for the incurring of indebtedness to pay for the cost of the construction or acquisition of sewers in such districts.

Section 2. Whenever the legislative body of any such city, town or municipal corporation shall, by resolution passed by a vote of two-thirds of all its members and approved by the executive of such municipality, determine that the public interest or convenience requires the construction of, or acquisition by purchase or otherwise of a sewer or any sewers in any part of the territory of such municipality, said legislative body shall describe in said resolution a district, naming and numbering the same as hereinabove provided, and declare said district to be the district benefited by said work or improvement, or acquisition of such sewer, and may, at any subsequent meeting, by ordinance passed by a vote of two-thirds of all of its members, and also approved by the said executive, adopt plans and specifications for the proposed sewer work (if to be constructed), and also describe the territorial district upon which the expense of such proposed sewer work or improvement, or acquisition, shall be chargeable, as hereinafter provided, and shall provide therein for a special election to be held in such city, town or municipal corporation. At such election there shall be submitted to the qualified electors of such city, town or municipal corporation, the proposition of incurring indebtedness for the purposes set forth in said resolution, and no question other than the incurring of the indebtedness for such purposes shall be submitted at such special election. The ordinance calling such special election shall also recite the objects and purposes for which the proposed indebtedness is to be incurred, the estimated cost of the proposed sewer work, improvement, or sewer system to be acquired, the amount of the principal of the indebtedness to be incurred

therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such special election shall be held, the manner of holding such election, and the manner of voting for or against the incurring of such indebtedness. In all particulars not recited in such ordinance, such election shall be held as is provided by law for holding general municipal elections in such city, town or municipal corporation. The maximum rate of interest to be paid on such indebtedness shall be six (6%) per centum per annum, payable semi-annually.

Section 3. Said ordinance shall be published once a day for five days, prior to the date set for such election in some newspaper of general circulation designated by the legislative body of said city, town or municipal corporation, which newspaper is published once a day for at least six days a week in such municipality, or such ordinance shall be published once a week for two weeks prior to the date set for such election, in some newspaper of general circulation designated by said legislative body, and published less than six days a week in such municipality, and one insertion thereof in such last described newspaper each week for two succeeding weeks prior to the date set for such election by the legislative body of said city, town or municipal corporation, shall be a sufficient publication in such newspaper published less than six days a week.

In municipalities where no newspaper is published, such ordinance shall be posted in three public places in the said sewer district for two succeeding weeks prior to the date set for such election by the legislative body of said city, town or municipal corporation. No other notice of such election need be given. It shall require the affirmative votes of two-thirds of all the aforesaid qualified electors of said city, town or municipal corporation voting at such special election, to authorize the incurring of said indebtedness and the issuance of bonds therefor as provided herein; provided, however, if the proposition so submitted at such election fail to receive the requisite number of votes of the aforesaid qualified electors of such city, town or municipal corporation, voting at such election to incur the indebtedness for the purpose specified, the legislative branch of such municipality shall have no power or authority within six months after such election, to pass any ordinance calling another election for incurring any indebtedness for sewer work within any sewer district which has within its boundaries any of the territory of the district in which, at said election, the requisite number of votes for the issuance of said bonds has not been cast therefor.

Section 4. All bonds issued under the provisions of this act shall be issued in the name of the city, town or municipal corporation in which such sewer district has been formed, and shall be payable in the following manner: A part to be determined by the legislative body of the municipality, which part shall not be less than the one [fortieth] part of the whole amount of such indebtedness, shall be payable each and every year on a day and date, and at a place within the United States, to be fixed by the legislative body of the city, town or municipal corporation issuing the said bonds, and designated in such bonds, together with the interest on all sums unpaid at such date, until the whole of said indebtedness shall have been paid.

The bonds shall be issued in such denominations as the legislative body of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars, and shall be payable on the day, and at the place

fixed in such bonds, and with interest at the rate specified in such bonds, which rate shall not be in excess of six per cent per annum, and shall be payable semi-annually, and said bonds shall be signed by any officer of said city, town or municipal corporation designated for that purpose by the city council, board of trustees or other legislative body of such city, town or municipal corporation, by resolution adopted by a two-thirds vote of all its members, and shall also be signed by the treasurer thereof, and shall be countersigned by the clerk of such city, town or municipal corporation. The coupons of said bonds shall be numbered consecutively and signed by the treasurer.

In case any of such officers whose signatures appear on the bonds or coupons shall cease to be such officer before the delivery of such bonds to the purchaser, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes, the same as if such officers had remained in office until the delivery of the bonds.

Section 5. The legislative body of the city, town or municipal corporation within whose territory such sewer district has been created as herein provided, may issue and sell said bonds at not less than their par value, and the proceeds of the sale of such bonds shall be placed in the municipal treasury to the credit of the proper sewer district fund and shall be applied exclusively to the purposes and objects mentioned in the said ordinance.

Section 6. Before the legislative body of such city, town or municipal corporation shall award the contract for doing any sewer work or improvement, the expense of which is to be paid out of the proceeds of sales of the bonds issued in accordance with the provisions of this act, said legislative body of said city, town or municipal corporation, shall cause notice with specifications to be posted conspicuously for five days on or near the chamber door of said legislative body, inviting sealed proposals or bids for doing said sewer work or improvement, and shall also cause notice of said work inviting said proposals and referring to the specifications posted or on file, to be published for two consecutive insertions in a daily, semi-weekly or weekly newspaper, published and circulated in said city, town or municipal corporation, designated by said legislative body for that purpose, and in case there is no newspaper published in said city, town or municipal corporation, then it shall only be posted as hereinbefore provided. All proposals or bids offered shall be accompanied by a check, payable to the order of the executive officer of said city, town or municipal corporation, certified by a responsible bank for an amount which shall be not less than ten (10%) per cent of the aggregate of the proposal, or by a bond for the said amount, and so payable, signed by the bidder and by two sureties who shall justify before an officer competent to administer an oath, in double such amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of said legislative body, and said legislative body shall in open session examine and publicly declare the same. Said legislative body may reject any or all proposals or bids should it deem this for the public good, and shall reject all proposals or bids other than the lowest proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the price named in his bid, which award shall be approved by the executive officer of said city, town or municipal corporation, or a three-fourths vote of the legislative body of said city, town or municipal corporation. If not approved by said executive officer or a three-fourths' vote of said legislative body, without further

proceedings the said legislative body may readvertise for proposals or bids for the performance of the work as in the first instance, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bid so rejected. But the checks accompanying such accepted proposals or bids shall be held by the clerk of said city, town or municipal corporation, until the contract for doing said work has been entered into by said lowest bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work within ten days after said contract shall have been awarded, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city, town or municipal corporation. The said legislative body shall have the right to require such bonds as they may deem adequate from the bidder to whom the contract for said work or improvement is awarded, to insure the faithful performance of said contract. Such officer of said city, town or municipal corporation as the legislative body thereof shall designate, is authorized, in his official capacity, to make all written contracts and to receive all bonds authorized by this act, and is authorized to fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day until completion, and he may extend the time so fixed from time to time under the direction of said legislative body of said city, town or municipal corporation; provided, however, that nothing herein contained shall be construed as prohibiting such city, town or municipal corporation itself from constructing or completing such sewer or improvement, and buying the material, and employing the labor necessary therefor; provided, however, that this section shall not apply where sewer systems, or any part of a sewer system, already constructed has been, or is to be acquired under this act.

And provided, further, that in cities, towns and municipal corporations operating under a charter heretofore or hereafter framed under section VIII, article XI of the constitution of the state of California, and providing for a board or department of public works, all the things required in this section to be done and performed by the legislative body of the municipality shall be done and performed by the board or department of public works of such city, town or municipal corporation, and in case such charter also prescribes the manner of letting and entering into contracts for the furnishing of labor, materials or supplies for the construction or completion of public work or improvements, all contracts for the construction or completion of sewer work or improvement shall be let and entered into in conformity with the provisions of such charter.

Section 7. The legislative body of said city, town or municipal corporation shall, at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect each year upon the property situated within such sewer district formed as hereinbefore set forth, and upon such property only, and until such bonds are paid or until there shall be a sum in the treasury of such city, town or municipal corporation set apart for that purpose, sufficient to meet all sums coming due for the principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds, and also such part of the principal thereof as shall become due before the time for fixing the next general tax levy. Provided, however, that if the maturity of the indebtedness created by the issue of said bonds or any part thereof, be made to begin more than

one year after the date of the issuance of such bonds, such tax shall be levied and collected at the time and in the manner aforesaid, annually, each year, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, on or before the payments herein provided for, shall become due.

The taxes herein required to be levied and collected shall be in addition to all other taxes levied for the municipal purposes, and shall be collected at the time, and in the manner, as other municipal taxes are collected, and shall be used for no other purpose than the payment of the sum or sums of money due on said bonds and the accruing interest thereon.

Section 8. It shall be the duty of the legislative body of every city, town or municipal corporation, wherein sewer work or improvement is being made or acquired under the provisions of this act, to make all needful rules and regulations for carrying out and maintaining such sewer work or improvement, to appoint all needful agents, superintendents and engineers to properly look after the construction and operation of such sewers, provided, that in cities, town and municipal corporations operating under a charter heretofore or hereafter framed under section VIII, of article XI of the constitution of the state of California, and having a board or department of public works, all the matters and things required in this section to be done and performed by the legislative body of the municipality shall be done and performed by the board or department of public works of such city, town or municipal corporation.

Section 9. This act shall in no wise affect any other act by the provisions of which sewer work or improvement may be done within or by any city, town or municipal corporation, but it is intended to and does provide an alternate system of proceedings for sewer work and improvements, and it shall be within the discretionary powers of the legislative body of any city, town or municipal corporation to proceed in making such improvements either under the provisions of this act, or under the provisions of any other act. But when any proceedings are commenced under this act the provisions of this act and such amendments thereto as may hereafter be adopted, shall thereafter apply to all work done under such proceedings until the completion thereof. If, after certain sewer work or improvement has been done or sewers acquired under provisions of this act, the legislative body of any city, town or municipal corporation shall deem it necessary or convenient to construct or acquire any additional sewer or sewers, it shall be within the discretionary powers of the legislative body of any city, town or municipal corporation to proceed in making such improvement either under the provisions of this act or under the provisions of any other act relative thereto. But any provisions contained in any other acts in conflict with the provisions hereof shall be void as to, and of no effect upon, proceedings commenced under the provisions of this act, except as herein provided.

The word "sewer" as used in this act shall be deemed to, and is hereby declared to, include sewers for sanitary or drainage purposes, drains or conduits for surface or storm waters, and the outlets therefor.

Section 10. This act shall take effect immediately.

4. Sewer District Act of 1909.

An act to provide for separate sewer districts within municipalities.

[Approved April 21, 1909. Stats. 1909, p. 1011.]

Section 1. The legislative body of any incorporated city or town may divide the territory of such municipality into two or more sewer districts, as may be made expedient by the configuration of the ground, and establish a separate sewer system for every such district.

Section 2. The proper municipal officers may levy a special sewer tax on all the taxable property in such sewer district, and the proceeds of such tax shall be expended exclusively for the building and maintenance of the sewer system in such district.

Section 3. After a city or incorporated town has been divided into sewer districts, an election may be held, in the manner provided for the issue of city bonds, to determine whether bonds for the building or extension of a sewer system in any such district shall be issued. At such election, only electors residing within such district shall be entitled to vote. If a majority of the electors voting at such election shall vote in the affirmative, the proper municipal officers shall issue and sell such bonds, substantially in the manner provided for the issue of city bonds. But the interest and sinking fund for the payment of such bonds shall be derived exclusively from taxes levied upon property within such district. All provisions of law relating to the payment of interest and sinking fund for city bonds shall govern, so far as applicable, the issue of sewer district bonds.

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SUPPLEMENT

TO

PAGE'S CALIFORNIA STREET LAWS

CONTAINING

ADDITIONAL STATUTES AND CHARTER PROVISIONS ADOPTED BY THE LEGISLATURE OF 1911

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1911

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I. TEXT OF GENERAL STATUTES.

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1. Bond Act of 1911.

An act providing for the issuance of improvement bonds to represent certain special assessments for public improvements, and providing for the effect and enforcement of such bonds.

[Approved April 27, 1911. Stats. 1911, p. 1192.]

§ 1. The expression "street opening act of 1903" as herein used shall mean the act entitled "An act to provide for the laying out, opening, extending, widening, or straightening in whole or in part, of public streets, squares, lanes, alleys, courts, and places, within municipalities, for the condemnation of property necessary or convenient for such purposes, and for the establishment of assessment districts and the assessment of property therein to pay the expenses of such improvement," approved March 24, 1903 (Stats. 1903, page 376) and acts amendatory thereto.

The expression "park act" as herein used shall mean the act entitled "An act to provide for the acquisition by municipalities of land for public park or playground purposes by condemnation, and for the establishment of assessment districts and the assessment of property therein to pay the expense of acquiring such land," approved April 22, 1909 (Stats. 1909, p. 1066).

The expression "street improvement act of 1909" as herein used shall mean the act entitled "An act to provide for the improvement of public streets, lanes, alleys, courts and places in municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," approved April 21, 1909 (Stats. 1909, page 1042).

The expression "improvement bond" as herein used shall mean a bond issued under the provisions of this act.

The terms "assessment" or "assessment-roll" as herein used shall mean a special assessment made under the provisions of any of the acts herein in this section specified.

The term "delinquency" as herein used shall mean delinquency in the payment of an assessment made under the provisions of the acts herein in this section specified and the expression "time of delinquency" shall mean the time in said acts fixed when assessments become delinquent.

The expression "city council" as herein used shall mean the legislative body of the municipality.

§ 2. The city council of any municipal corporation of this state may, in its discretion, at or before the time of the confirmation of any assessment or assessment-roll in proceedings had and taken under the street opening act of 1903, the park act or the street improvement act of 1909,

determine that improvement bonds may issue to represent such assessments, which determination shall be made by resolution or ordinance.

§ 3. Whenever it is determined as provided in section 2 hereof that improvement bonds may be issued to represent assessments, the owner of any lot or parcel of land against which an assessment has been made, when the amount of such assessment is fifty ($50) dollars or over, may at any time prior to delinquency, elect to pay such assessment in installments and to have an improvement bond issued against such lot, in the form and manner and with the effect in this act; provided there be no other bond or bonds outstanding against said lot representing any special assessment.

§ 4. Such election shall be made by such owner or his agent thereunto duly authorized in writing filed with the superintendent of streets or if said assessment is in the custody of the city tax collector with such tax collector, an affidavit made before a competent officer that he or his principal, as the case may be, is the owner of the lot or parcel of land in question, which affidavit must be accompanied by a certificate of a searcher of records, that he or his principal is such owner and also by filing with such officer a written agreement upon the form hereinafter fixed, waiving all objections of whatsoever kind or nature against the assessment and all proceedings thereto and undertaking to pay the amount of such assessment in either five or ten annual installments, each of which shall be due on the first day of July of each year, and the first of which shall be due on the first day of July next following the date of such bond, with interest on all deferred payments at the rate of seven per cent per annum, payable at the same time as the installments of principal. Said agreement shall contain a provision to the effect that in case of default in the payment of any installment of the principal provided for therein, or interest accrued on deferred payments, at the time called for by said agreement, then, and in that event, the entire remaining unpaid installments shall become immediately due and payable, and that the same, and all liens and agreements which are security therefor, may be collected and enforced as in this act provided. Said agreement shall be in the following or substantially the following form (filling blanks):

The undersigned, being the owner of the lot assessed in the assessment for —— said lot being assessed therein for the sum of —— ($——) dollars, does hereby expressly waive and release all objections of whatsoever kind or nature against the said assessment and all proceedings prior thereto and in consideration of the benefit of said improvement and of the extension of time for paying therefor herein requested, do undertake and agree to pay the amount of said assessment, to wit: the sum of —— ($——) dollars in —— yearly installments, at the time, in the manner, and with the interest, specified and provided in —— (title of act), and do request and elect to have a bond issued against said lot in the manner and form and with the effect provided in said act, and do expressly agree that in the case of default in the payment of any installment of the principal provided for in said bond, or interest accrued on deferred payments, then, and in that event, that the entire remaining unpaid installments shall become immediately due and payable, and that the same, and all liens and agreements which are security therefor, may be collected, and enforced as in this act provided.

Upon an election being effected as herein provided the superintendent of streets or other officer having in his custody said assessment shall make a note thereof in his records opposite the assessment as to which such election is made. All agreements and affidavits made and filed hereunder shall be bound in a substantial book and kept among the records of the superintendent of streets, or other officer having custody of such assessments. At the time of delinquency, such officer shall advise, in writing, the city treasurer respecting the assessments as to which the owners have elected to pay in installments. The city treasurer shall thereupon prepare a separate bond representing each assessment as to which such right of election has been exercised, running for either five (5) or ten (10) years, as specified in the agreement made as herein provided, which bond shall be in the following or substantially the following form (filling blanks):

Improvement Bond.

Series ——.

$——. No. ——.

Under and by virtue of and pursuant to the provisions of —— (title of act), I, out of the fund for the above designated improvement bonds, series —— will pay to bearer the sum of —— ($——) dollars with interest at the rate of seven (7) per cent per annum, as is hereinafter specified, at the office of the city treasurer of the city of ——, state of California. This bond is issued to represent an assessment for —— in the city of —— as the same is more fully described in the assessment therefor. Its amount is the amount assessed in said assessment against the lot numbered —— therein and in the diagram attached thereto, and which now remains unpaid; but until paid, with accrued interest, is a first lien upon the property affected thereby, as the same is described herein and in said recorded assessment with its diagram, to wit: the lot or parcel of land in the city of ——, county of ——, state of California, described as follows:

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and it is issued in accordance with the written request therefor on file in the office of —— the —— of said city.

This bond is payable exclusively from said fund, and neither the city of —— nor any officer thereof is to be holden otherwise for its principal or interest. The term of this bond is —— years from July first, 19——, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the first day of July of each year, after the date hereof, an even annual proportion of its principal is due and payable upon presentation of the coupon therefor, until the whole is paid, with accrued interest at the rate of seven (7) per cent per annum.

The interest is payable annually on the first day of July in each year hereafter upon presentation of the coupons therefor, the first of which is for the interest from date to the first day of July, 19——, and thereafter the interest coupons are for the annual interest.

Should default be made in the first, or any succeeding payment of the principal, or in any payment of interest, by the owner of said lot, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and shall thereupon have a right to collect the same and to enforce all liens and agreements which are security therefor as in said act provided.

At said city of ——, this —— day of ——, in the year one thousand nine hundred and ——.

——,
City Treasurer of the City of ——.

Said bonds shall be payable to the bearer and no mistake or error in the description in the bond of the lot assessed shall affect the validity or lien of the bond, unless the mistake or error is such that the lot cannot be identified, and in such event the holder of such bond may have the same corrected upon application to the city treasurer and the officers or board who or which made the assessment to represent which such bond is issued.

§ 5. The city treasurer shall enter in a book kept for that purpose in his office, a record of each bond issued hereunder, specifying the date of its issue, the amount for which issued, to whom delivered, its duration and a description of the lot against which issued. Payments of principal and interest on account of any bond issued hereunder shall be made to the city treasurer, who shall keep a separate account of all such payments (entering the same in the record herein required to be kept), and place the same in appropriate funds for the payment of principal and interest of the bonds on account of which paid, and who shall, upon the surrender of the coupons attached to said bond, pay to the holder thereof, or his order, the amount called for by said coupons out of the funds in his possession applicable thereto.

§ 6. Improvement bonds issued hereunder shall by their issuance be conclusive evidence of the regularity and validity of all proceedings thereto. The amount due upon any such bond shall be a lien upon the lot described in such bond superior to all other liens, charges, and encumbrances except the liens of prior assessments and of municipal, state and county taxes.

§ 7. Improvement bonds or any number of such bonds, issued hereunder, except as otherwise provided in section 9 hereof, shall be sold to the highest cash bidder, after advertisement for bids, which advertisement shall be published for at least three times in a daily newspaper published and circulated in said city, or if there be no such daily newspaper, then such advertisement shall be published once in a weekly or semi-weekly newspaper so published and circulated; provided, however, that said bonds shall not be sold for less than par. If any bond be sold for an amount in excess of par such excess shall be paid into the general fund of the city.

§ 8. The proceeds of the sale of such improvement bonds shall be paid into the fund of the proceeding to represent assessments in which said bonds were issued.

§ 9. It shall be competent for the city to advance to the appropriate fund the par value of all or any part of said bonds, in which case said city shall have the same rights in respect to the enforcement and collection thereof as other purchasers. Where the city advances money as in this section provided it shall have full authority at any time to sell said bonds to reimburse itself therefor.

§ 10. Whenever, through the default of the owner of any lot or parcel of land upon which such bond is issued to represent the assessment, payment, either of the principal, or of the interest, is not made when the same has become due, and the holder of the bond thereupon demands, in

writing, that the city treasurer proceed to advertise and sell said lot or parcel of land as herein provided, then the whole bond or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent.

§ 11. Upon the application of the holder of any bond that is now or shall hereafter become delinquent as hereinbefore provided, the said city treasurer shall publish twice in a newspaper of general circulation, to be designated by him, published in the city where his office is situated, a notice which must contain the date, number, and series of the delinquent bond, a description of the property mentioned in said bond, and the name of the owner of such property (if known), and if unknown, the fact shall be so stated, the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the cost of publication of such notice are paid, the real property described in said bond will be sold at public auction on a day to be therein fixed, which shall not be less than fifteen nor more than thirty days from the day of the first publication of said notice, and the place of such sale, which must be the office of the said city treasurer. A like notice shall not less than fifteen days before the day of sale so fixed be served upon any such owner if known either personally or by depositing the same in the postoffice at such city addressed to such owner at his address if known with the postage thereon prepaid.

At any time prior to the sale, the owner or person in possession of any real estate offered for sale under the provisions of this act may pay the whole amount of said bond then due, with costs, and such bond shall thereupon be canceled; but in case such payment is not made by such owner or person in possession, or by someone in behalf of such owner, or person in possession, the property subject thereto shall be sold at public auction to the bidder offering to pay the amount due on the bond with costs for the least portion of such lot or parcel of land offered for sale.

§ 12. The city treasurer, before the day of sale hereinafter provided for, must file with the city clerk a copy of the publication, with an affidavit of the publisher of such newspaper, or someone in his behalf, attached thereto, that it is a true copy of the same; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication was made—which affidavit is prima facie evidence of all the facts stated therein.

§ 13. The city treasurer must collect, in addition to the amount due on such bond, the cost of the publication of such notice, and fifty cents for the certificate of sale delivered to the purchaser as hereinafter provided.

§ 14. The city treasurer, before delivering any certificate of sale must, in a book kept in his office for that purpose, enter the date, number and series of the bond, a description of the land sold corresponding with the description in the certificate, the date of sale, purchaser's name, the amount paid, regularly number the descriptions on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection during office hours when not in actual use,

and he shall enter on the record of the bond the words "canceled by sale of the property," giving the date of such sale.

§ 15. Immediately on the sale, the purchaser shall become vested with a lien on the property, so sold to him, to the extent of his bid, and is only divested of such lien by the payment to the city treasurer of the purchase money, including costs herein provided for, with interest thereon at the rate of one per cent per month from the date of sale.

§ 16. A redemption of the property sold may be made by the owner of the property, or any party in interest, within twelve months from the date of purchase, or at any time prior to the application for a deed, as hereinafter provided. Redemption must be made in lawful money of the United States, and when made to the city treasurer he must credit the amount paid to the person named in his certificate, and pay it on demand to him or his assignees.

§ 17. On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the city treasurer, the fee for which shall be fifty cents, and on presentation of the receipt of the city treasurer for the total amount of the redemption money, the recorder must, without charge, mark the word "Redeemed," the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made.

§ 18. If the property is not redeemed within the time allowed by the provisions of section 16 hereof for its redemption, the city treasurer, or his successor in office, upon application of the purchaser, or his assignee, must make to said purchaser, or his assignee, a deed to the property, reciting in the deed, substantially, the matter contained in the certificate and that no person has redeemed the property during the time allowed for its redemption; the treasurer shall be entitled to receive from the purchaser two dollars for making said deed, which shall be deposited in the city treasury for the use of the city after payment has been made therefrom for the acknowledgment of said deed; provided, however, that the purchaser of the property, or his assignee, or agent, must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate of sale, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties, and costs in this act required. In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the purchaser applies for a deed; and no deed to the property sold, in accordance with the provisions of this act, shall be issued by the city treasurer to the purchaser of such property, until such purchaser shall have filed with such treasurer an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the

said treasurer as other records kept by him in his office. Such purchaser shall be entitled to receive the sum of fifty cents for his service of such notice and the making of such affidavit, which sum of fifty cents shall be paid by the redemptioner at the time and in the same manner as the other sums, costs and fees are paid.

§ 19. The deed, when duly acknowledged or proved, shall be conclusive evidence of all things which the bond upon which it is based is conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issue of the bond, and conveys to the grantee the absolute title to the lands described therein, free of all encumbrances, except the lien for state, county, and municipal taxes.

In several respects, this act is similar to the bond provisions of the Local Improvement Act of 1901. As to election and waiver, see pp. 503–506.

As to effect of conclusive evidence clause, see pp. 381–385, 469, 495–496.

As to priority of lien, see pp. 27, 28, 229–231, 385, 386, 498, 556.

As to sale for delinquency, see index, title "Sale for Delinquency."

As to certificate of sale, see index, title "Certificate of Sale."

As to notice of application for deed, see pp. 394, 395, 472–474, 561, 634–636, 696–698.

For a discussion of the Street Improvement Act of 1909, see pp. 661–701.

For a discussion of the Street Opening Act of 1903, see pp. 535–566.

2. City Boundary Improvement Act.

An act to provide for work upon streets, avenues, lanes, alleys, courts and places forming the exterior boundaries of any municipality, whether partly, or wholly, within or without said boundaries, and providing for the construction of sewers, drains and sidewalks thereon and in connection therewith.

[Approved April 21, 1911. Stats. 1911, p. 1018.]

§ 1. All streets, avenues, lanes, alleys, courts, or places forming the exterior boundaries of any municipality of this state, whether partly, or wholly, within or without said boundaries, now open or dedicated, or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, avenues, lanes, alleys, places or courts for the purposes of this act, and the city council of each municipality, and the board of supervisors of the county in which said municipality is located, are hereby empowered to establish and change the grades of said streets, lanes, alleys, avenues, places or courts, and fix the width thereof, and are hereby invested with jurisdiction to order to be done thereon any of the work mentioned in section 2 of this act, under the proceedings hereinafter described.

§ 2. Whenever the public interest or convenience may require, said council and said board of supervisors are hereby authorized and empowered to order the whole, or any portion, either in length or width, of any streets, avenues, lanes, alleys, places or courts forming the exterior boundaries of any municipality, whether partly, or wholly, within or without said boundaries, graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, sewered or resewered,

and to order sidewalks, manholes, culverts, bridges, cesspools, gutters, tunnels, curbings and crosswalks to be constructed therein, and to order storm water ditches, channels, breakwaters, levees or walls of rock or other material to protect the same from overflow or injury, and to order any other work to be done, which shall be necessary to complete the whole, or any portion of said streets, avenues, lanes, alleys, courts, places or sidewalks, and they may order any of said work to be improved; and also to order a sewer or sewers with outlets for drainage or sanitary purposes, in, over, or through any right of way granted or obtained for such purposes.

§ 3. The council of each municipality, and the board of supervisors of the county in which said municipality is located, shall have concurrent jurisdiction of all proceedings under this act, and the council, or board, passing the resolution of intention hereinafter provided for shall thereafter have exclusive jurisdiction of all work and proceedings covered by said resolution, except as herein otherwise provided.

§ 4. Before ordering any work done, or improvement made, which is authorized by section 2 of this act, the said council, or the said board of supervisors, shall pass a resolution of intention so to do and describing the work, which shall be posted conspicuously for two days on or near the chamber door of said council, or board, and published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said municipality, and designated by said council, or board, for that purpose. The street superintendent of said municipality, when the resolution is passed by said council, or the county surveyor, when the resolution is passed by said board, shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing, or any part thereof, in front of each quarter block and irregular block liable to be assessed, notices of the passage of said resolution. Said notice shall be headed "notice of street work," in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for six days in one or more daily newspapers published and circulated in said municipality, and designated by said council, or board, or in municipalities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated. In case there is no such paper published in said municipality, said notice shall be posted for six days on or near the chamber door of said council, or board, and in two other conspicuous places in said municipality. The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the council, or board, who shall indorse thereon the date of its reception by him. Said council, or board shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The clerk of said council, or board, shall thereupon notify the

persons making such objections, by depositing a notice of the time and place fixed for the hearing of said objections in the postoffice of said municipality, postage prepaid, addressed to each objector, or his agent, when he appears for such objector. At the time specified said council, or board, shall hear the objections urged, and pass upon the same, and its decision thereon shall be final and conclusive. At the expiration of twenty days after the expiration of the time of said publication of said notice given by said street superintendent, or county surveyor, and at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention, if no written objection to the work therein described has been delivered, as aforesaid, by the owners of the majority of the frontage of the property fronting on said proposed work or improvement or if any written objection has been overruled by the said council, or board, the said council, or board, shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act; which order or resolution, when made, shall be published for two days, the same as provided for the publication of the resolution of intention. Before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said council, or board, if required, by the city engineer of said municipality, or the county surveyor, and for the work of constructing sewers, specifications shall always be furnished by him. Whenever the contemplated work of improvement, in the opinion of the council, or board, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, or county surveyor, the total estimated costs and expenses thereof would exceed one-half of the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment-roll whereon it was assessed for taxes for county purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the council, or board, may make the expense of such work or improvement chargeable upon a district, which the said council, or board, shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof. Objections to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may be made by interested parties in writing, within ten days after the expiration of the time of publication of the notice of the passage of the resolution of intention. The council, or board, shall, at its next meeting, fix a time for hearing said objections not less than one week thereafter. The clerk thereof shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice of said municipality, postage prepaid, addressed to each objector. At the time specified the council, or board, shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If the objections are sustained, all proceedings shall be stopped; but proceedings may be immediately again commenced by giving the notice of intention to do the said work or make said improvements. If the objections are overruled by the council, or board, the proceedings shall continue the same as if such objections had not been made.

§ 5. The owners of a majority in frontage of lots and lands fronting on any street, avenue, lane, alley, place or court, or of lots or lands liable to be assessed for the expense of the work petitioned to be done, or their duly authorized agents, may petition the council, or board, to order any of the work mentioned in this act to be done, and the council, or board, may order the work mentioned in said petition to be done, after notice of its intention so to do has been posted and published as provided in section 4 of this act.

§ 6. Before the awarding of any contract by the council, or board, for doing any work authorized by this act, the council, or board, shall cause notice, with specifications, to be posted conspicuously for five days on or near the council, or board, chamber door, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work, inviting said proposal, and referring to the specifications posted or on file, to be published for two days in a daily, semi-weekly, or weekly newspaper published and circulated in said municipality, designated by the council, or board, for that purpose, and in case there is no newspaper published in said municipality, then it shall only be posted as hereinbefore provided. All proposals or bids offered shall be accompanied by a check payable to the order of the mayor of the municipality, or president of the board of supervisors, certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and by two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of said council, or board, and said council, or board, shall, in open session, examine and publicly declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satisfactory to the council, or board. The council, or board, may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent and unfaithful in any former contract with the municipality or county, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid. If not approved by the council, or board, without further proceedings, the council, or board, may readvertise for proposals or bids for the performance of the work as in the first instance, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bid so rejected. But the checks accompanying such accepted proposals or bids shall be held by the clerk of said council, or board, until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage, whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said municipality, or county, and shall be collected by it and paid into its fund for repairs of streets, avenues, lanes, alleys, courts and places herein mentioned, and any bond forfeited

may be prosecuted, and the amount due thereon collected and paid into said fund. Notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the posting of proposals for said work, and shall be published for two days in a daily newspaper published and circulated in said municipality and designated by said council, or board, or in municipalities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated and designated; provided, however, that in case there is no newspaper printed or published in any such municipality, then such notice of award shall only be kept posted as hereinbefore provided. The owners of three-fourths of the frontage of lots and lands upon the street whereon said work is to be done, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first posting and publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within fifteen days after the first posting and publication of said award, and to prosecute the same with diligence to completion, it shall be the duty of the superintendent of streets, or county surveyor, to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid. But if such original bidder neglects, fails or refuses, for fifteen days after the first posting and publication of the notice of award, to enter into the contract, then the council, or board, without further proceedings, shall again advertise for proposals or bids, as in the first instance, and award the contract for said work to the then lowest regular bidder. The bids of all persons and the election of all owners, as aforesaid, who have failed to enter into the contract as herein provided, shall be rejected in any bidding or election subsequent to the first for the same work. If the owner, or contractor, who may have taken any contract, does not complete the same within the time limited in the contract, or within such further time as the council, or board, may give them, the superintendent of streets, or county surveyor, shall report such delinquency to the council, or board, which may relet the unfinished portion of said work, after pursuing the formalities prescribed hereinbefore for the letting of the whole in the first instance. All contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the superintendent of streets, or county surveyor, with two or more sureties and payable to such municipality, or county, in such sums as the council, or board, shall deem adequate, conditioned for the faithful performance of the contract; and the sureties shall justify before any person competent to administer an oath, in double the amount mentioned in said bond, over and above all statutory exemptions. Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, or county surveyor, for payment by him, the cost of publication of the notices, resolutions, orders, or other incidental expenses and matters required under the proceedings prescribed in this act, and such other notices as may be deemed requisite by the council, or board. And in case the work is abandoned by the council, or board, before the letting of the contract, the incidental

expenses incurred previous to such abandonment shall be paid out of the treasury of the municipality, or county.

§ 7. The superintendent of streets, or county surveyor, is hereby authorized, in his official capacity, to make all written contracts, and receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act; and he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the council, or board. The work provided for in section 2 of this act must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, or county surveyor, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets, or county surveyor, and all contracts made therefor must contain a provision to that effect, and also express notice that, in no case, except where it is otherwise provided in this act, will the municipality, or county, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The council, or board, may, by ordinance, prescribe general rules directing the superintendent of streets, or county surveyor and the contractor, as to the materials to be used, and the mode of executing the work, under all contracts thereafter made. The assessment and apportionment of the expenses of all such work or improvement shall be made by the superintendent of streets, or county surveyor, in the mode herein provided.

§ 8. Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract, file with the superintendent of streets, or county surveyor, a good and sufficient bond, approved by him, in a sum not less than one-half of the total amount payable according to the terms of said contract, such bond shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor on, or furnish materials to be used in the said work of improvement, and shall provide that if the contractor, person, company, or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialmen, person, company or corporation, furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets or county surveyor, a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same or their assigns may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court, for the prosecution thereof.

§ 9. Sub. 1. The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

Sub. 2. The expense of all improvements, until the streets, avenues, street crossings, lanes, alleys, places, or courts, are finally accepted, as provided in section 18 of this act shall be assessed upon the lots and lands, as provided in this section, according to the nature and character of the work. And after such acceptance the expense of all work thereafter done on the portion thereof lying within the municipality shall be paid by said municipality out of the street department fund, and all work thereafter done on the portion thereof lying without the boundaries of the municipality shall be paid by said county out of the general road fund, and if at any time thereafter the portion thereof lying without the boundaries of the said municipality shall be included within its boundaries, then the expense of all work thereafter done thereon shall be paid by said municipality out of the said street department fund.

Sub. 3. The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, halfway to the next main street crossing, and three hundred feet on blocks where no such crossing intervenes within six hundred feet of such street crossing, but only according to its frontage in said quarter blocks and irregular blocks.

Sub. 4. Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, according to the frontage of such lots on said main street; provided, that lots and lands more than three hundred feet from such termination on such cross street shall not be assessed for any portion of such expense at such termination, and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination.

Sub. 5. Where an alley or subdivision street crosses a main street, the expense of all work done on said crossing shall be assessed on all lots or portions of lots halfway on said alley or subdivision street to the next crossing or intersection, or to the end of such alley or subdivision street, if it does not meet another.

Sub. 6. The expense of work done on alley or subdivision street crossings shall be assessed upon the lots fronting upon such alley or subdivision streets on each side thereof, in all directions, halfway to the next street, place or court, on either side, respectively, or to the end of such alley or subdivision street, if it does not meet another; provided that lots and lands more than three hundred feet from such crossing on such alley or subdivision street shall not be assessed therefor.

Sub. 7. Where a subdivision street, avenue, lane, alley, place, or court terminates in another street, avenue, lane, alley, place or court, the expense

of the work done on one-half of the width of the subdivision street, avenue, lane, alley, place, or court opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street, or avenue, lane, alley, place, or court so terminating, according to its frontage thereon, halfway on each side respectively to the next street, avenue, lane, alley, court, or place, or to the end of such street, avenue, lane, alley, place, or court, if it does not meet another; provided, that lots and lands located more than three hundred feet from such termination on such subdivision street shall not be assessed therefor, and the other one-half of the width upon the lots fronting such termination.

Sub. 8. Where any work mentioned in this act (manholes, cesspools, culverts, crosswalks, piling, and capping excepted) is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expenses of said work so ordered shall be made upon the lots, or portions of the lots only fronting the portions of the work so ordered.

Sub. 9. Section 1 of chapter 325 of the laws of this state, entitled "An act amendatory of and supplementary to an act to provide revenue for the support of the government of this state, approved April twenty-ninth, eighteen hundred and fifty-seven," approved April nineteenth, eighteen hundred and fifty-nine, shall not be applicable to the provisions of this section; but the property herein mentioned shall be subject to the provisions of this act, and be assessed for work done under the provisions of this section.

Sub. 10. The council, or board, may include in one resolution of intention and order any of the different kinds of work mentioned in this act, and it may except therefrom any of said work already done upon the street to the official grade. The lots and portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made.

Sub. 11. Whenever the resolution of intention declares that the costs and expenses of the work and improvement are to be assessed upon a district, the council, or board, shall direct the city engineer, or county surveyor, to make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces, or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the council, or board, the clerk shall, at the time of such approval, certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the superintendent of streets, or county surveyor, of said municipality, or county, who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets, or county surveyor, and council or board, on appeal, if an appeal is taken, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such proposed work, and in so doing shall assess said total sum upon the several

pieces, parcels, lots, or portions of lots, and subdivisions of land in said district benefited thereby, to wit: upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section and the provisions of subdivisions 3, 4, 5, 6, 7 and 8 of this section shall not be applicable to the work or improvement provided for in this subdivision.

§ 10. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent, or county surveyor, and council, or board, on appeal, if an appeal is taken, the street superintendent, or county surveyor, shall make an assessment to cover the sum due for the work performed and specified in said contract (including any incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done; or, if any direction and decision be given by said council, or board, on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with any incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot or portion of a lot (if known to the street superintendent, or county surveyor, if unknown the word "unknown" shall be written opposite the number of the lot), and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram exhibiting each street or street crossing, lane, alley, place, or court, on which any work has been done, and showing the relative location of each district lot, or portion of lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed, for said work contracted for and performed.

§ 11. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, or county surveyor, and countersigned by the mayor of said municipality, or the president of said board. The said warrant shall be substantially in the following form:

Form of the Warrant.

By virtue hereof, I (name of the superintendent of streets) of the city of ——, county of ——, (or county surveyor of county, or city and county of ——), and state of California, by virtue of the authority vested in me as said superintendent of streets, or county surveyor, do authorize and empower (name of contractor), (his or their) agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same.

(Date.)

Countersigned by (name of mayor of municipality or president of board).

——,

(Name of superintendent of streets or county surveyor.)

Said warrant, assessment, and diagram, together with the certificate of the city engineer, or county surveyor, shall be recorded in the office of said superintendent of streets, or county surveyor. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said

recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment, diagram and certificate, all persons mentioned in section 13 of this act shall be deemed to have notice of the contents of the record thereof. After said warrant, assessment, diagram, and certificate are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets, or county surveyor, of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agent, or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments. Whenever it shall appear by any final judgment of any court of this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of said street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof made to, or recorded by said superintendent of streets, or county surveyor, any person interested therein may, at any time within three months after the entry of said final judgment, apply to said superintendent of streets, or county surveyor, who issued the same, or to any superintendent of streets, or county surveyor, in office at the time of said application, for another assessment to be issued in conformity to law; and said superintendent of streets, or county surveyor, shall, within fifteen days after the date of said application, make and deliver to said applicant a new assessment, diagram, and warrant in accordance with law; and the acting mayor of the municipality, or president of the board, shall countersign the same as now provided by law, which assessment shall be a lien for the period of two years from the date of said assessment, and be enforced as provided in section 9 of this act.

§ 12. The contractor, or his assigns, or some person in his, or their behalf, shall call upon the persons assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. If any payment be made the contractor, his assigns, or some person in his or their behalf, shall receipt the same upon the assessment in presence of the person making such payment, and shall also give a separate receipt if demanded. Whenever the persons so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as "unknown" on the assessment, then the said contractor, or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed. The warrant shall be returned to the superintendent of streets, or county surveyor, within thirty days after its date, with a return indorsed thereon, signed by the contractor, or his assigns, or some person in his or their behalf, verified upon oath, stating the nature and character of the demand, and whether any of the assessments remain unpaid, in whole or in part, and the amount thereof. Thereupon the superintendent of streets, or county surveyor, shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full length in a book to be kept for that purpose in his office, and shall sign the record. The said superintendent of streets, or county surveyor, is authorized at any time to receive the amount due upon any assessment list

and warrant issued by him, and give a good and sufficient discharge therefor; provided, that no such payment so made after suit has been commenced, without the consent of the plaintiff in the action, shall operate as a complete discharge of the lien until the costs in the action shall be refunded to the plaintiff; and he may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns to whom the assessment and warrant were issued; and if any contractor shall fail to return his warrant within the time and in the form provided in this section he shall thenceforth have no lien upon the property assessed; provided, however, that in case any warrant is lost, upon proof of such loss a duplicate can be issued, upon which a return may be made, with the same effect as if the original had been so returned. After the return of the assessment and warrant as aforesaid, all amounts remaining due thereon shall draw interest at the rate of ten per cent per annum until paid.

§ 13. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets, or county surveyor, in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, or county surveyor, shall, within thirty days after the date of the warrant, appeal to the council, or board, by briefly stating their objections in writing, and filing the same with the clerk of said council, or board. Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days. Upon such appeal, the said council, or board, may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets, or county surveyor, relative to said work; may confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the council, or board; and may instruct and direct the superintendent of streets, or county surveyor, to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said council, or board, in relation thereto, at their option. All the decisions and determinations of said council, or board, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said council, or board, might have remedied and avoided; and no assessment shall be held invalid, except upon appeal to said council, or board, as provided in this section for any error, informality, or other defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the council, or board, to order the work to be done, for which the assessment is made, has been actually published in any designated newspaper of said city for the length of time prescribed by law, before the passage of the resolution ordering the work to be done.

§ 14. At any time after the period of thirty-five days from the date of the warrants, as herein provided, or if an appeal is taken to said council, or board, as provided in section 13 of this act, at any time after five days from the decision of said council, or board, or after the return of the warrant or assessment, after the same may have been corrected, altered, or modified, as provided in said section 13 (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. And in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars, as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor. Suit may be brought in the superior court of the county within whose jurisdiction the said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners thereof cannot, with due diligence, be found, the service in each of such actions may be had in such manner as is prescribed in the codes and laws of this state. The said warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets, or county surveyor, and council, or board, upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action. The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts; and on appeal, the appellate courts shall be vested with the same power to adjudge and decree a lien and to order such premises to be sold on execution or decree as is conferred on the court from which an appeal is taken. Such premises, if sold, may be redeemed as in other cases. In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the codes of this state. This act shall be liberally construed to effect the ends of justice.

§ 15. The council, or board, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent, or county surveyor, to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as provided herein.

§ 16. The records kept by the superintendent of streets, or county surveyor in conformity with the provisions of this act, and signed by him,

shall have the same force and effect as other public records, and copies therefrom, duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any citizen wishing to examine them, free of charge.

§ 17. Notices in writing which are required to be given by the superintendent of streets, or county surveyor, under the provisions of this act, may be served by any person with the permission of the superintendent of streets, or county surveyor, and the fact of such service shall be verified by the oath of the person making it, taken before the superintendent of streets, or county surveyor, who for that purpose, and for all other purposes, and in all cases where a verification is required under the provisions of this act, is hereby authorized to administer oaths, or other person authorized to administer oaths, or such notices may be delivered by the superintendent of streets, or county surveyor, himself, who must also verify the service thereof, and who shall keep a record of the fact of giving such notices, when delivered by himself personally, and also of the notices and proof of service when delivered by any other person.

§ 18. Whenever any street, or portion of a street, has been or shall hereafter be fully constructed to the satisfaction of the superintendent of streets or county surveyor, and of the council, or board, and is in good condition throughout and a sewer, gas-pipes, and water-pipes are laid therein, under such regulations as the council, or board, shall adopt, the same shall be accepted by the council, or board, by ordinance, and thereafter shall be kept in repair and improved by the said municipality, or county as herein directed; provided that the council, or board, may partially or conditionally accept any street, or portion of a street, without a sewer, or gas-pipes, or water-pipes therein, if the ordinance of acceptance expressly states that the council, or board, deems such sewer, or gas-pipes, or water-pipes to be then unnecessary, but the lots of land previously, or at any time, assessable for the cost of constructing a sewer shall remain and be assessable for such cost, and for the cost of repairs and restoration of the street damaged in the said construction, whenever said council, or board, shall deem a sewer to be necessary, and shall order it to be constructed, the same as if no partial or conditional acceptance had ever been made. The superintendent of streets, or county surveyor, shall keep in his office a register of all streets accepted by the council, or board, under this section, which register shall be indexed for easy reference thereto.

§ 19. The council, or board, shall have full power and authority to construct sewers, gutters, and manholes and provide for the cleaning of the same, and culverts or cesspools, or crosswalks or sidewalks, or any portion of any sidewalk upon or in any of such streets, avenues, lanes, alleys, courts or places, and also for drainage purposes over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same, of such materials, in such a manner, and upon such terms as it may be deemed proper.

§ 20. The said council, or board, may, in its discretion, order by resolution that the whole or any part of the cost and expenses of any of the work mentioned in this act be paid out of the treasury of the municipality, or county, from such fund as the council, or board, may designate. When-

ever the work to be done is situated partly within, and partly without, the municipality, both the council and the board may, in their discretion, order, by resolution, that the whole, or any part of the costs and expenses of the work mentioned in this act, be paid out of the treasury of said municipality, or county, or both, and when the whole or a portion thereof is to be paid out of both, each shall pay such proportion thereof as may be agreed upon, from such funds as the said council or board may designate.

§ 21. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, or county surveyor, in making up the assessment heretofore provided for such cost and expenses, shall first deduct from the whole cost and expense such part thereof as has been so ordered to be paid out of the municipal treasury or county treasury, as the case may be, and shall assess the remainder of said cost and expense proportionately upon the lots, parts of lots, and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided.

§ 22. The city engineer, or where there is no city engineer, or the proceedings hereunder are before the board of supervisors, the county, or city and county surveyor shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof; and every certificate signed by him in his official character shall be prima facie evidence in all courts in this state of the truth of its contents. He shall also keep a record of all surveys made under the provisions of this act, as in other cases.

§ 23. The term "incidental expenses," as used in this act, shall include the compensation of the city engineer or county surveyor for work done by him to be fixed by said council or board; also the cost of printing and advertising as provided in this act, and not otherwise. All demands for incidental expenses mentioned in this section shall be presented to the street superintendent, or county surveyor, by itemized bill, duly verified by oath of the demandant.

§ 24. The notices, resolutions, orders or other matter required to be published by the provisions of this act, shall be published in a daily newspaper, in municipalities where such there is, and where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council, or board, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that only in case there is no daily, semi-weekly or weekly newspaper printed or circulated in any such municipality then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such municipality. Proof of the publication or posting of any notice provided for herein shall be made by affidavit

of the owner, publisher or clerk of the newspaper, or of the poster of the notice. No publication or notice, other than that provided for in this act, shall be necessary to give validity to any of the proceedings provided for herein.

§ 25. Whenever the words "council" or "board" are used herein only that word applying to the body before which the proceedings are pending shall be used in the reading and construction of the provisions of this act in relation to proceedings before such body. The word "council" is hereby declared to include any body or board which, under the law is the legislative department of the government of any municipality. The word "board" is hereby declared to include the board of supervisors of any county, or city and county.

§ 26. The words "superintendent of streets," "street superintendent" or "city engineer" used herein, shall be used in the application and construction of this act only when the resolution of intention and the proceedings are under the jurisdiction of the council of the municipality, and this act shall then be read and construed as if the words "or county surveyor," were not incorporated herein, and when the resolution of intention and the proceedings are under the jurisdiction of the board of supervisors, the county surveyor shall perform all of the acts and duties herein required of the superintendent of streets and city engineers, and this act shall be read and construed, when said proceedings are under the jurisdiction of the board of supervisors, as if the said words "street superintendent," "superintendent of streets" and "city engineer" were not incorporated herein, and the words "county surveyor" only were used.

§ 27. The words "work," "improved" and "improvement," as used in this act shall include all work mentioned in this act, and also the construction, reconstruction and repairs of all or any portion of said work.

§ 28. The word "municipality," as used in this act, shall be understood and so construed as to include and is hereby declared to include, all corporations heretofore organized and now existing, and those hereafter organized, for municipal purposes.

§ 29. The words "paved" or "repaved," as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the council or board shall by ordinance adopt.

§ 30. The word "street," as used in this act, shall be deemed to, and is hereby declared to, include avenues, highways, lanes, alleys, crossings, or intersections, courts and places, and the term "main street" means such actually opened street or streets as bound a block; and the word "blocks" whether regular or irregular, shall mean such blocks as are bounded by main streets, or partially by a boundary line of the municipality.

§ 31. The terms "street superintendent" and "superintendent of streets," as used in this act, shall be understood and so construed as to include, and

(45) To order the whole or any portion, either in length or width, of any street, avenue, lane, alley, court, public place, or sidewalk within the city of Vallejo to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, sewered or resewered, and to order sidewalks, manholes, culverts, bridges, cesspools, gutters, tunnels, curbing and crosswalks to be constructed therein or thereon, and to order storm-water ditches and channels, breakwaters, levees or walls of rock or other material to protect the same from overflow or injury, and to order any other work to be done which shall be necessary to complete the work or any portion of said streets, avenues, lanes, alleys, courts, public places, or sidewalks; also to order any other work or improvement therein or thereon; to provide for the care of shade trees planted therein or thereon, and to cause shade trees to be planted, set out and cultivated therein or thereon, and also to order a sewer or sewers, with outlets, for drainage or sanitary purposes in, on, over, or through private property. Whenever, in the judgment of the council, the cost and expense of any of the foregoing improvements should be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto.

(46) To order the opening, extending, widening, straightening or closing of any street, lane, alley, court, or public place within the city or over the tide land or lands within the city covered by the waters of the Mare Island Straits, and to condemn or acquire any and all property necessary or convenient for that purpose. Whenever, in the judgment of the council the cost and expense of any of the foregoing improvements should be paid by special assessment on private property, the general laws of the state of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto, except that no commissioner, secretary or attorney shall be appointed, and that all the duties imposed on commissioners, secretaries and attorneys under the general law shall be performed under the direction of the commissioner of public works and the city attorney of the city, neither of whom shall receive compensation therefor; provided, that nothing contained in this subdivision shall be construed as affecting any pending proceeding. To make provision for the deposit with the treasurer, by any person, firm or corporation desiring to open any sidewalk, street, alley, lane, court, park or other public place, for the purpose of laying or removing any pipe, wire, conduit, sewer or other structure therein, of moneys sufficient to cover the cost of refilling and covering such opening and restoring the sidewalk, street, lane, alley, court, park or other public place to the condition in which it was before such opening was made, and to provide for the doing of such work at the expense of the person, firm or corporation making such opening, such expense to be paid out of such deposit.

[This is a new charter, and supersedes the old charter discussed in the text.]

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